Supreme Court, U.S.
FILED
DEC 6 1996
CLERK

(6)

No. 96-5658

In The

Supreme Court of the United States

October Term, 1996

CARY MICHAEL LAMBRIX,

Petitioner,

vs.

HARRY SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 16, 1996
Certiorari Granted November 1, 1996

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RELEVANT DOCKET EVENTS

March 29, 1983:	Petitioner indicted on two counts of first degree murder.
December 17, 1983:	Guilt phase of first trial. Declaration of mistrial.
February 27, 1984:	Guilt phase of second trial.
February 29, 1984:	Sentencing phase of trial. Jury recommends that Petitioner be sentenced to death.
March 22, 1984:	Petitioner sentenced to death.
September 25, 1986:	Convictions and death sentence affirmed by the Supreme Court of Florida, Lambrix v. State.
November 25, 1986:	Time within which to file petition for writ of certiorari expires.
September 29, 1987:	Petition for writ of habeas corpus filed in the Supreme Court of Florida.
January 27, 1988:	Supplement to petition for writ of habeas corpus filed.
August 18, 1988:	Petition for writ of habeas corpus denied by the Supreme Court of Florida, Lambrix v. Dugger.
October 27, 1988:	Motion to vacate convictions and sentences pursuant to Florida Rule of Criminal Procedure 3.850 filed in the Circuit Court of the Twentieth Judicial Circuit, in and for Glades County, Florida.
November 18, 1988:	Motion to vacate convictions and sentences denied by order of the

	Circuit Court of the Twentieth Judicial Circuit, in and for Glades County, Florida.
November 23, 1988:	Notice of appeal from denial of motion to vacate convictions and sentences filed in the Supreme Court of Florida.
November 30, 1988:	Motion for stay of execution and appeal of denial of motion to vacate convictions and sentences denied by order of the Supreme Court of Florida.
December 1, 1988:	Petition for writ of habeas corpus and motion for stay of execution filed in the District Court for the Southern District of Florida.
December 2, 1988:	Stay of execution granted by order of District Court for Southern District of Florida.
November 20, 1989:	Amendment to petition for writ of habeas corpus filed.
August 20, 1991:	Evidentiary hearing on petition for writ of habeas corpus.
May 12, 1992:	Petition for writ of habeas corpus denied by order of the District Court for the Southern District of Florida, Lambrix v. Dugger (Zloch, J.).
June 12, 1992:	Notice of appeal from denial of petition for writ of habeas corpus filed in the United States District Court for the Southern District of Florida.

September 1, 1992:	Certificate of probable cause to appeal granted by the United States Court of Appeals for the Eleventh Circuit.
March 3, 1993:	Appellee's motion to hold proceedings in abeyance and to toll time for filing its brief granted by the Court of Appeals for the Eleventh Circuit.
June 16, 1993:	Petition for writ of habeas corpus filed in the Supreme Court of Florida.
June 16, 1994:	Petition for writ of habeas corpus denied by order of the Supreme Court of Florida, Lambrix v. Singletary.
January 3, 1996:	Appeal of denial of petition for writ of habeas corpus denied by order of the Court of Appeals for the Eleventh Circuit, Lambrix v. Singletary.
February 7, 1996:	Appellee's motion for clarification and/or modification of opinion denied by order of the Court of Appeals for the Eleventh Circuit.
April 8, 1996:	Appellant's motion for rehearing denied.

IN THE CIRCUIT COURT OF THE TWENTIETH
JUDICIAL CIRCUIT IN AND FOR
GLADES COUNTY, FLORIDA

STATE OF FLORIDA	)	CASE NO. 83-12
vs.	)	
CARY MICHAEL LAMBRIX	)	
	)	

DEFENDANT'S REQUESTED JURY INSTRUCTION NO.

Section 921-14(5)(h), F.S.

(h) THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATTROCIOUS, [sic] OR CRUEL. THIS SECTION APPLIES ONLY WHERE THE ACTUAL COMMISSION OF THE CAPITAL FELONY WAS ACCOMPANIED BY SUCH ADDITIONAL ACTS AS TO SET THE CRIME APART FROM THE NORM OF CAPITAL FELONIES – THE CONSCIOUSLESS OR PITILESS CRIME WHICH IS UNNECESSARILY TORTUOUS TO THE VICTIM.

"Henius" [sic] means extremely wicked or shockingly evil. "Attrocious" [sic] means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

Authority: *State v. Dixon,* 283 So 2d 1 (Fla. 1973).

_ Given
X Denied

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The aggravating circumstance of "especially henious, [sic] atrocious or cruel" means a murder which is accompanied by such additional acts as to set the crime apart for the norm. It is the conscienceless or pitiless crime which is unnecessarily torturous to the victim. This aggravatging [sic] circumstances does not apply where the victim dies instantaneously and painlessly without additional acts.

Authority: *State v. Dixon*, 283 So2d 1, 9 n. 8 (Fla. 1973).

Cooper v. State, 336 So2d 1133, 1141 (Fla. 1976).

_ Given
X Denied

IN THE CIRCUIT COURT OF THE TWENTIETH
JUDICIAL CIRCUIT IN AND FOR
GLADES COUNTY, FLORIDA

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	)	CF 83-12
vs.	)	
CARY MICHAEL LAMBRIX	)	
	)	

DEFENDANT'S REQUESTED JURY INSTRUCTION NO.

In order that you might better understand and be guided concerning the meaning of aggravating circumstance (8), the Court hereby instructs you:

> "What is intended to be included in the category of heinous, atrocious and cruel are those capital crimes where the actual commission of the capital felony was accompanied by such *additional acts* as to set the crime apart from the norm of capital felonies that consciousless or pitiless crime which is *unnecessarily tortuous to the victim.*"

Authority: *State v. Dixon*, 283 So2d 1 (Fla. 1973)

Godfrey v. Georgia, 48 U.S. Law Weekly 4541 (May 19, 1980)

_ Given
X Denied

EXCERPTS OF FEBRUARY 29, 1994 TRIAL TRANSCRIPT

* * *

[2662] change that. We have done all we can do for Gary at this point. We hand the case to you with open arms. We ask you to come back with open arms and recommend life and not come back with clinched fists in anger. Thank you very much.

THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his two crimes of two counts of first degree murder. That is two separate counts, being two separate crimes.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given you by the court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established [2663] by the evidence:

One, that the crime for which the Defendant is to be sentenced was committed while he was under sentence of imprisonment.

Next, that the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of a robbery.

Next, the crime for which the Defendant is to be sentenced was committed for financial gain.

Next, that the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

Next, that the crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

If you find that the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years on each count.

You will bring back two verdicts in this case, ladies and gentlemen, one verdict as to each count.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the [2664] aggravating circumstances.

Among the mitigating circumstances that you may consider, if established by the evidence, are:

The conviction of worthless checks is not an aggravating circumstance to be considered in determining the

penalty to be imposed on the Defendant but a conviction of that crime may be considered by the jury in determining whether the Defendant has a significant history of prior criminal activity. The jury may determine that the Defendant has no significant history of prior criminal activity.

The age of the Defendant at the time of the crime and any other aspect of the Defendant's character or record and any other circumstance of the offense, each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstance are established, you should consider all of the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you are reasonably convinced that a mitigating circumstance [2665] exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on those considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury. The fact that the determination of whether a majority of you recommend

the sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

Ladies and gentlemen of the jury, in reaching your decision on the question of punishment you are to weigh the evidence in aggravation and mitigation but you are cautioned that in a case such as this you are not to be influenced by any passion, prejudice or other arbitrary factors.

The procedure to be followed by you is not a mere [2666] counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment to what factual situations require the imposition of death and which can be satisfied by life imprisonment without possibility of parole for 25 years in light of the totality of the circumstances present.

In this instance, ladies and gentlemen, should your recommendation be life and the sentence be passed as to life and it would be 25 years as to each particular count, should the Court run those sentences concurrently, the two sentences would total 25 years. Should the Court run those sentences consecutively, then it would be 50 years without possibility of parole.

The evidence presented by the Defendant that the Defendant acted under duress is a mitigating circumstance and you must consider it as such.

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. It is not sufficient to furnish evidence merely tending to prove the existence of an aggravating circumstance, not to prove a mere probability of the existence of an aggravating circumstance, but proof of an aggravating circumstance to the exclusion of and beyond every [2667] reasonable doubt is absolutely necessary.

You must carefully, impartially and conscientiously consider, compare and weigh all the evidence, and if after doing this you think your understanding, judgment and reason are well satisfied and convinced to the extent of having a full, firm and abiding conviction that an aggravating circumstance has been proved to the exclusion of and beyond a reasonable doubt, you may consider the aggravating circumstance.

A doubt which is a mere possible doubt, a speculative, imaginary or forced doubt is not a reasonable doubt, and for that reason that everything relating to human affairs is open to some doubt of this kind, such a doubt must not influence the jury in considering an aggravating circumstance where they have an abiding conviction of such aggravating circumstance. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of the existence of an aggravating circumstance, or, if, after a conviction it is one which is not stable but one which

wavers and vacillates, then the existence of the aggravating circumstance is not proved beyond every reasonable doubt and you must not consider the aggravating circumstance because the doubt is reasonable.

[2668] If the evidence shows beyond a reasonable doubt that the death was caused by one or more of numerous wounds to the decedent, you may be justified in finding that the killing was especially heinous, atrocious or cruel.

In order that you might better understand and be guided concerning the manner in which you should consider and evaluate the enumerated aggravating circumstances, the Court hereby instructs you that where the same conduct gives rise to or establishes the existence of two or more aggravating circumstances, you can only consider that conduct as one aggravating circumstance. For example, aggravating circumstances eight and nine are so similar in import that you can only consider one of them as an aggravating circumstance where their existence is proven beyond a reasonable doubt.

In order that you might better understand and be guided concerning the manner in which you should consider and evaluate the enumerated aggravating circumstances, the Court hereby instructs you that the aggravating circumstances specified in these instructions are exclusive. In deciding whether or not to recommend the death penalty no other factor or circumstance may be used as an aggravating circumstance.

[2669] In order that you might better understand and be guided concerning the manner in which you should consider the enumerated mitigating circumstances, the

Court hereby instructs you that you may consider as a mitigating factor any aspect of a Defendant's character or record or any of the circumstances of the offense that the Defendant offers as the basis for a sentence less than death. The factors listed in the statute and these instructions merely indicate the principal factors to be considered.

The Court instructs you hereby that the age of the Defendant at the time of the crime is included as a mitigating circumstance to allow you to consider the inexperience of the Defendant on the one hand or the length of time the Defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of his life.

The Court hereby instructs you that in considering what is or is not significant criminal activity, you must look at the Defendant's record and weigh, for example, traffic offense on the one hand and armed robberies on the other, and determine which represents significant criminal activity. The less criminal activity on the Defendant's record, the more consideration you should give to this mitigating circumstance.

[2670] The Court hereby instructs you that where the same conduct gives rise to or establishes the existence of two or more aggravating circumstances, you can only consider that conduct as one aggravating circumstance.

With regard to your decision to recommend life or death, the Court hereby instructs you that there is nothing which would suggest that the decision to afford an individual Defendant mercy violates our constitution. You are empowered to decline to recommend the penalty

of death even if you find one or more aggravating circumstances and no mitigating circumstances. You are required to use a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present. The procedure, therefore, should not be viewed as a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances.

With regard to the effect of your recommendation of life or death, the Court hereby instructs you that although your recommendation is considered to be advisory, your recommendation of death upon conviction of first degree murder is entitled to a great weight. On the other hand, in order for the Court to impose a sentence of death following a jury recommendation of [2671] life, the facts suggesting a sentence of death must be so clear and convincing that virtually no reasonable person could differ.

In considering the aggravating circumstances, you must not consider mere arrests or accusations which may have been made against the Defendant. The Defendant is not on trial for any conduct not contained within the specific aggravating circumstances and you must consider the evidence only as it relates to those aggravating circumstances.

The purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the Defendant to ascertain whether the ultimate penalty of death is called for in this particular case.

Section 921.14(5)(A), Florida Statutes: "(a) That the capital felony was committed by a person under sentence of imprisonment applies where the Defendant was a prisoner, an escapee or on parole at the time of the offense."

The sentence which you recommend to the Court must be based on the facts as you find them from the evidence and the laws given to you by the Court. The procedure to be followed by you, the jury, is not a mere counting process of X number of aggravating circumstances and Y [2672] number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment light of the totality of the circumstances present.

The aggravating circumstances which you may consider are limited to those listed in the statute and about which you have been instructed. The mitigating circumstances which you may consider are unlimited and you may consider all relevant evidence presented at the trial or the sentencing proceedings in mitigation of the Defendant's sentence.

You may consider any factor that has been presented to you as a mitigating circumstance. You are not limited to the mitigating circumstances that I have listed for you.

Ladies and gentlemen of the jury, I charge you that you need not find any mitigating circumstance in order to return a sentence of life imprisonment. A life sentence may be returned regardless of the evidence.

In order to impose a death sentence you must be convinced beyond a reasonable doubt that the totality of

the aggravating circumstances outweigh the totality of the mitigating circumstances. If you are not [2673] convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, you must return a verdict of life imprisonment.

The mitigating circumstances which you may consider are unlimited and you may consider any evidence presented at trial or at the sentencing proceeding in mitigation of the Defendant's sentence.

I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them are established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other factors or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

In deciding whether the Defendant, Mr. Gary Lambrix, should be sentenced to death or to life in prison, you must weigh the mitigating circumstances against the aggravating circumstances that you find to be established by the evidence. The fact that you have found Mr. Lambrix guilty beyond a reasonable doubt of the crime of murder in the first degree – aggravated murder – is not itself an aggravating circumstance.

The State of Florida must establish the existence of aggravating circumstances beyond and to the exclusion [2674] of every reasonable doubt. Mitigating circumstances need only be established by the fair weight of the evidence, that is that they exist more likely than not. If you find that any of the evidence presented at either the

trial or sentencing hearing gives rise to mitigating circumstances more likely than not, you are to consider those mitigating circumstances in the weighing process.

The Court hereby instructs you that you may consider the character of the deceased as it has been presented by the evidence as a mitigating circumstance in determining whether or not to recommend the death penalty.

Are there any additional instructions that the State wishes me to give?

MR. McGRUTHER: No, Your Honor.

THE COURT: Any additional instructions the defense wishes me to give?

MR. JACOBS: No, Your Honor.

THE COURT: If a majority of the jury determines that the Defendant should be sentenced to death, your advisory sentence will be as follows –

MR. McGRUTHER: Excuse me. May we approach the bench? Neither one of us has seen the forms prepared.

THE COURT: You have not seen them, gentlemen?

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR GLADES COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA Plaintiff, vs. CAREY MICHAEL LAMBRIX, a/k/a MICHAEL RAY LAMBRIX, a/k/a MICHAEL TOWNSEND, Defendant.	CASE NO. CF 83-12 (Filed March 22, 1984)

FINDINGS IN SUPPORT OF SENTENCE OF DEATH

The Defendant, CAREY MICHAEL LAMBRIX, having been charged with the offenses of two counts of First Degree Murder in the deaths of ALEISHA DAWN BRYANT, a human being, and CLARENCE EDWARD MOORE, JR., a/k/a LAWRENCE LAMBERSON, a human being, by an Indictment filed by the Grand Jury of Glades County, Florida, and a verdict of Guilty of First Degree Murder on each count having been returned by a jury together with an advisory sentence of Death on each count by a majority of the jury, a Presentence Investigation having been furnished the Court, and the Court having considered, studied and reasoned finds, after weighing the aggravating circumstances set forth in Florida Statute 921.141(5) and the mitigating circumstances enumerated in Florida Statute 921.141(6), as well as all other mitigating circumstances presented, finds that there are sufficient aggravating circumstances to impose the

death penalty, and there are insufficient mitigating circumstances to support a sentence of life imprisonment.

The Court finds that the aggravating circumstances were:

1. The capital felonies were committed by a person under sentence of imprisonment (Escaped December 23, 1982, from Lakeland Community Correctional Center where he was serving two years in Florida State Prison System).

2. The defendant was previously convicted of another capital felony. (First Degree Murder. Two counts returned jointly by the jury in the instant case.) (King vs. State 390 So2 315).

3. The capital felony was committed for pecuniary gain. Testimony showed the defendant went through the pockets of the male deceased, and also, stole his automobile.

4. The capital felonies were especially heinous and atrocious. The facts speak for themselves.

5. The capital felonies were homicides and were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Defendant had not had one harsh word with either of the victims and, in fact, had not known them before that night. He enticed Mr. Moore out to himself and beat him to death with a tire iron. He then enticed Miss Bryant out and strangled her to death. He then left her head in a puddle of water so that on the off chance she was still alive she would drown. He then went back in to the trailer, washed up and ate a plate of spaghetti.

The Court finds that there are no mitigating circumstances in this case.

The Court is of the opinion that beyond and to the exclusion of every reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. The totality of the circumstances dictate the death penalty be imposed. Therefore, it is the sentence of this Court that CAREY MICHAEL LAMBRIX is to be executed in accordance with the laws of the State of Florida for the First Degree Murder of ALEISHA DAWN BRYANT and the First Degree Murder of CLARENCE EDWARD MOORE, JR., a/k/a LAWRENCE LAMBERSON.

DATED this 22nd day of March, 1984.

/s/ Richard M. Stanley
RICHARD M. STANLEY
Circuit Judge

Cary Michael LAMBRIX, Appellant,

v.

STATE of Florida, Appellee.

No. 65203.

Supreme Court of Florida.

Sept. 25, 1986.

ADKINS, Justice.

Cary Lambrix appeals his conviction on two counts of first-degree murder and the imposition of two sentences of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm both convictions and sentences.

On the evening of February 5, 1983, Lambrix and Frances Smith, his roommate, went to a tavern where they met Clarence Moore, a/k/a Lawrence Lamberson, and Aleisha Bryant. Late that evening, they all ventured to Lambrix' trailer to eat spaghetti. Shortly after their arrival, Lambrix and Moore went outside. Lambrix returned about twenty minutes later and requested Bryant to go outside with him. About forty-five minutes later Lambrix returned alone. Smith testified that Lambrix was carrying a tire tool and had blood on his person and clothing. Lambrix told Smith that he killed both Bryant and Moore. He mentioned that he choked and stomped on Bryant and hit Moore over the head. Smith and Lambrix proceeded to eat spaghetti, wash up and bury the two bodies behind the trailer. After burying the bodies, Lambrix and Smith went back to the trailer to wash up. They then took Moore's Cadillac and disposed of the tire tool and Lambrix' bloody shirt in a nearby stream.

On Wednesday, February 8, 1983, Smith was arrested on an unrelated charge. Smith stayed in jail until Friday. On the following Monday, Smith contacted law enforcement officers and advised them of the burial.

A police investigation led to the discovery of the two buried bodies as well as the recovery of the tire iron and bloody shirt. A medical examiner testified that Moore died from multiple crushing blows to the head and Bryant died from manual strangulation. Additional evidence exists to support a finding that Lambrix committed the two murders in question.

In accordance with the jury's recommendation, the trial judge imposed two sentences of death on appellant, finding five aggravating and no mitigating circumstances in regard to the murder of Moore and four aggravating and no mitigating circumstances in regard to the murder of Bryant. Appellant now contends that numerous errors occurred during the guilt phase of the trial. We disagree.

Appellant's first contention on appeal concerns the constitutionality of death-qualified juries. Appellant asserts that the exclusion of jurors opposed to the death penalty results in juries that are not representative of the community and conviction prone. The Eighth Circuit accepted this argument in *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir.1985). However, the United States Supreme Court recently overruled *Grigsby*, in *Lockhart v. McCree*, ___ U.S. ___ 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Further, this assertion has already been raised and rejected by this Court. *Dougan v. State*, 470 So.2d 697 (Fla.1985). Once again, we reject this contention.

Appellant contends that the trial court erred in excluding juror Mary Hill for cause in violation of the standards set forth in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The problem with appellant's argument is that the United States Supreme Court has recently rejected the standards set forth in *Witherspoon*. In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Court held that the proper standard for excluding jurors in death cases is the test enunciated in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). In *Adams*, the Court held that:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

488 U.S. at 45, 100 S.Ct. at 2526.

Unlike the *Witherspoon* standard, the standard set forth in *Witt* to determine whether a prospective juror may be excluded for cause because of his or her views on capital punishment does not require that a juror's bias be proved with unmistakable clarity. *Witt*, 105 S.Ct. at 852.

The transcript of voir dire indicates that Mrs. Hill repeatedly waivered when questioned about her ability to vote in favor of the death penalty. The relevant voir dire testimony is as follows:

> MR. GREENE (Prosecutor): Let's go to phase two. If you did in fact come back with a guilty of one or both counts of first degree murder, then we go to the penalty phase. At that point, the jury makes a recommendation to Judge Stanley as to life imprisonment or death penalty.

> Could you vote for the death penalty if you were convinced by the evidence and the instructions the Judge gave you?
>
> MRS. HILL: No.
>
> MR. GREENE: Under any circumstances, could you consider the death penalty?
>
> MRS. HILL: I don't think so. Life imprisonment yes, but –
>
> MR. GREENE: If you gave me an "if possible", I know it's hard for you to do. Could you give me a possibly as a definite answer, as possibly to yes or no? Could you, under any circumstances, vote for the death penalty?
>
> MRS. HILL: No.
>
> MR. GREENE: You would never consider the death penalty?
>
> MRS. HILL: No, I could never.
>
> MR. GREENE: Are you sure of that?
>
> MRS. HILL: Yes. I worked with children too much. That's one of the reasons why I couldn't do it.
>
> MR. GREENE: Your Honor, based on her answers, the State would ask that she be excused for cause.
>
> THE COURT: You may inquire.
>
> MR. JACOBS (Defense Attorney): Ma'am do you feel that you could consider the guilt or innocence in this case if you were asked to decide whether my client was guilty or not guilty? Do you think you could do that?

MRS. HILL: Yes.

MR. JACOBS: Regardless of your views on the death penalty, you could do that?

MRS. HILL: Yes.

MR. JACOBS: Okay. Do you feel that after listening to Judge Stanley's instructions, you could follow the law, and consider – that's not saying you have to return a death recommendation – all the law requires is that you consider it?

MRS. HILL: Yes.

MR. JACOBS: You feel that you could consider it?

MRS. HILL: Yes.

Following a recess, the court questioned Mrs. Hill and the following transpired:

THE COURT: Mrs. Hill, having to do with the death penalty, under any circumstances, could you vote for the death penalty?

MRS. HILL: No.

THE COURT: Ma'am, you may step down for cause.

Mrs. Hill told the prosecutor that she could not consider the death penalty under any circumstances and told the defense attorney that she could follow the instructions of the judge and consider the death penalty. Both attorneys, being capable advocates, led Mrs. Hill down the path of their choosing. Thus, the most pertinent portion of Mrs. Hill's voir dire testimony is her response to questions asked by the trial judge, the ultimate symbol of neutrality. The fact that Mrs. Hill told the trial judge that she could

not vote for the death penalty under any circumstances is controlling.

The above quoted testimony indicates that Mrs. Hill's feelings concerning capital punishment would substantially impair her ability to act as an impartial juror. Further, we pay great deference to a trial judge's finding in this regard because, unlike a reviewing court, he is in a position to observe the juror's demeanor and credibility. *Valle v. State*, 474 So.2d 796 (Fla.1985). Thus, the trial judge did not err in excluding Mrs. Hill for cause.

Appellant next argues that the trial court violated his sixth amendment right to confront witnesses by limiting his cross-examination of the state's key witness, Francis Smith. We disagree. As noted earlier, Francis Smith was with Lambrix on the night the murders occurred. Smith was arrested a few days after the murder on the charge of aiding and abetting a fugitive. The fugitive was Cary Lambrix, who had earlier escaped from state prison.

Ms. Smith's testimony at trial allegedly conflicted with a statement she made during her short period of incarceration. Defense counsel sought to bring out this inconsistency but was denied that opportunity when the court sustained an objection made by the state. At trial, in a proffered cross-examination outside the presence of the jury, defense counsel sought to bring out the inconsistency as follows:

MR. JACOBS (Defense Attorney): Miss Smith, have you made the statement to any police officer you were not with Cary Lambrix from the 1st to the 5th of February and that you did not see him until the 9th of February 1983?

> MS. SMITH: I don't remember any statement like that.
>
> MR. JACOBS: Judge, that's the only question I have. And I don't know for the record – I don't know where that opens any doors. I don't know where that would be considered opening any doors. That's why I want it proffered.

The statement defendant refers to was made by Smith to a police officer during her two-day incarceration. The "doors" that defense counsel refers to concern the state's ability to inquire into the details of Smith's arrest and allow the jury to find out that Lambrix was a fugitive.

The record reveals that defense counsel sought to ask one question and receive one answer. Counsel was trying to impeach the witness by way of a prior inconsistent statement without opening any doors that would be harmful to his case.

The question and answer proffered by defense counsel would, at best, enable the jury to raise an inference that perhaps the witness had made a prior inconsistent statement. Thus, although the proffered question may have been relevant, any probative value of the question and answer was clearly outweighed by the danger of misleading or confusing the jury by only hinting at and not establishing the inconsistency. § 90.403, Fla.Stat. (1983).

Obviously, defense counsel did not want to lay the proper predicate to impeach Ms. Smith. In order to properly impeach Ms. Smith, counsel would have to prove that she actually made the prior inconsistent statement. Counsel could do so by either producing the statement or

eliciting testimony from the police officer to whom the statement had been made. Either of these methods would open the door and allow the state to introduce the circumstances surrounding Ms. Smith's incarceration. The question was only the first step in impeaching the witness and, standing alone, serves no purpose. Thus, we find that the trial court acted within its sound discretion in excluding the proffered question.

Appellant contends that the trial court erred in restricting the cross-examination of Connie Smith (no relation to Francis), a special agent with the Florida Department of Law Enforcement. Agent Smith participated in the crime scene investigation. On direct examination, Smith testified as to the location of the victim's bodies, what she observed inside appellant's trailer, and other details concerning the scene of the crime. On cross-examination, defense counsel sought to elicit information regarding a notebook found in Moore's vehicle and a picture found in Moore's wallet. On cross-examination proffered outside the presence of the jury, Agent Smith testified that the markings in the notebook were consistent with those of a drug-smuggler and that the photograph was of a person who was a suspect in a RICO investigation. The trial court sustained the state's objection to these questions as "outside the scope of direct."

It is well established that questions on cross-examination must relate to credibility or matters brought out on direct examination. *Pearce v. State*, 93 Fla. 504, 112 So. 83 (1927). The court below properly denied cross-examination on these items as they were not testified to on direct and do not relate to credibility. Rather, appellant was improperly seeking to use cross-examination as a

vehicle for presenting defensive evidence. *Steinhorst v. State,* 412 So.2d 332 (Fla.1982).

Appellant contends that the trial court erred in allowing the medical examiner, Dr. Schultz, to use the term "homicide" in reference to the deaths of Moore and Bryant. Appellant asserts that such testimony was given without proper predicate.

Toward the beginning of his direct examination, Dr. Schultz testified that "[a]n autopsy is an examination . . . to determine the cause of death as near as one can . . . in either a natural setting or, in the case we are referring to, in a setting of post-homicide." Counsel objected to Dr. Schultz's reference to use of the word "homicide" on the ground that it constituted an expression of opinion as to appellant's guilt or innocence. We reject counsel's reasoning. Dr. Schultz never expressed an opinion as to appellant's guilt or innocence nor can such an inference be drawn from his testimony.

Appellant relies on *Spradley v. State,* 442 So.2d 1039 (Fla. 2d DCA 1983), in which the court found it error to allow a medical examiner to testify that a "homicide" had occurred to the exclusion of other possible causes of death when a sufficient predicate has not been laid. The record reveals that Dr. Schultz testified that the autopsies were performed "in a setting of post-homicide" before a proper predicate had been laid. However, unlike *Spradley,* in the instant case, Dr. Schultz followed the use of the term "homicide" with extensive testimony about the results of the autopsies and the facts he had relied upon to conclude that a homicide had occurred. In so doing, Dr. Schultz indicated that he had relied upon the type of

material that experts in the field normally rely upon. We refuse to penalize the state merely because its expert jumped the gun and mentioned the word "homicide" before a sufficient factual predicate had been laid, when a sufficient factual predicate exists and is brought out during subsequent testimony. Further, in this instance, a sufficient factual predicate was laid before Dr. Schultz testified that Moore was "obviously the victim of a homicidal blow" and that Bryant died from manual strangulation after receiving two non-lethal blows. Thus, the trial judge did not abuse his discretion in overruling the state's objections to Dr. Schultz's testimony.

Appellant does not contest the trial judge's application of five aggravating and no mitigating circumstances to the murder of Moore, and four aggravating and no mitigating circumstances to the murder of Bryant. The five aggravating circumstances found by the trial judge are: (1) the capital felonies were committed by a person under sentence of imprisonment, section 921.141(5)(a), Florida Statutes (1983); (2) the defendant was previously convicted of another capital felony, section 921.141(5)(b); (3) the capital felony was committed for pecuniary gain, section 921.141(5)(f); (4) the capital felonies were especially heinous, atrocious or cruel, section 921.141(5)(h); and (5) the capital felonies were homicides and committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i).

After a careful review of the record, we agree with the trial judge and all of the parties involved that five aggravating circumstances apply to the murder of Moore and four aggravating circumstances apply to the murder

of Bryant. The circumstance that the murder was committed for pecuniary gain only applied to the murder of Moore because, following the murder, Lambrix stole Moore's automobile.

Accordingly, we affirm both of Lambrix' convictions and sentences.

It is so ordered.

McDONALD, C.J., and BOYD, OVERTON, EHRLICH and SHAW, JJ., concur.

PETITION FOR WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. SECTION 2254

Prisoner's name: CARY MICHAEL LAMBRIX

Prison number: A482053

Place of confinement: Florida State Prison, Starke, Florida

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
___ DIVISION

CARY MICHAEL LAMBRIX, Petitioner, v. RICHARD DUGGER, Secretary, Department of Corrections, State of Florida, Respondent.	EMERGENCY: DEATH WARRANT SIGNED. EXECUTION SCHEDULED FOR 12:01 P.M., FRIDAY, DECEMBER 2, 1988.

PETITION FOR WRIT OF HABEAS CORPUS
BY PERSON IN STATE CUSTODY

To the Honorable ___, Judge of the District Court for the Southern District of Florida, Petitioner, Cary Michael Lambrix, through counsel, hereby

* * *

amendments. His ineffectiveness resulted in the violation of Mr. Lambrix's fundamental right to be free from double jeopardy. Had the first jury been allowed to deliberate

to a verdict, they most likely would have returned a verdict of guilty to a lesser included offense, or even acquitted Mr. Lambrix, as evidenced by their question regarding the punishment for second-degree murder. At the least, they would not have recommended the death penalty.

21. Mr. Lambrix's sixth, eighth and fourteenth amendment right to a determination of his guilt by a fair and impartial jury was also violated. The double jeopardy clause, and the fifth, sixth, eighth, and fourteenth amendments requires that Mr. Lambrix's convictions and sentences to be set aside.

CLAIM XIII

THE FLORIDA SUPREME COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF *MAYNARD V. CARTWRIGHT*, 108 S. CT. 1853 (1988), AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

All other allegations contained in this petition, its appendices, and the accompanying memorandum are fully incorporated herein by specific reference.

1. Since the time of Mr. Lambrix's trial and direct appeal, the United States Supreme Court has decided *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988). Under *Cartwright*, Mr. Lambrix is clearly entitled to relief. *Maynard* has changed the standard of review applied to claims of this type (and changed the standard of review which the

Florida Supreme Court had been applying to this class of constitutional claims). It is thus as "substantial" a change in law as *Hitchcock v. Dugger*, and thus falls squarely within the standards enunciated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Cf. Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987)(*Hitchcock* is a change in law because it rejected "mere presentation" standard of review applied to *Lockett v. Ohio* issues); *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987) (same). This claim was thus appropriately brought in the state court post-conviction instant Rule 3.850 proceedings, *see Witt, supra; Tafero v. State*, 459 So. 2d 1034 (Fla. 1984); *Downs, supra*, and is thus appropriately before this Court.

2. In *Proffitt v. Florida*, 428 U.S. 242 (1976), the United States Supreme Court approved the Florida Supreme Court's construction of the "heinous, atrocious, or cruel" aggravating circumstance, holding:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So. 2d, at 9. See also *Alford v. State*, 307 So. 2d 433, 445 (1975); *Halliwell v. State*, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those

> charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted).

3. The construction approved in *Proffitt* was not utilized at the jury-sentencing phase of Mr. Lambrix's case. The jury was simply instructed that one of the aggravating circumstances was the "capital felony was especially wicked, atrocious, or cruel" (R. 1286). The explanatory or limiting language approved by *Proffitt* does not appear anywhere in the record. The court provided no further definition of this circumstance to guide the jury's deliberations.

4. In *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988), the jury found the murder to be "especially heinous, atrocious, or cruel," and the state Supreme Court affirmed, reciting facts which supported the application of the circumstance. The United States Supreme Court affirmed the Tenth Circuit's grant of relief, explaining that this procedure did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. The Supreme Court's eighth amendment analysis fully applies to Mr. Lambrix's case. The result here should be the same as *Cartwright*:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was

> held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972).
>
> *Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was not principled means provided to distinguish those that received the penalty from those that did not. *E.g.*, *id.*, at 310 (Stewart, J., concurring); *id.*, at 311 (White, J., concurring). Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. *Gregg v. Georgia*, 428 U.S. 153, 189, 206-207 (1976) (opinion of Stewart, Powell, and Stevens); *id.*, at 220-222 (White, J., concurring in judgment); *Spaziano v. Florida*, 468 U.S. 447, 462 (1984); *Lowenfield v. Phelps*, 484 U.S. ___, ___ (1988).
>
> *Godfrey v. Georgia*, 446 U.S. 420 (1980), which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death narrowing principle to apply to those facts, to warrant the imposition of the death penalty.
>
> We think the Court of Appeals was quite right in holding that *Godfrey* controls this case. First, the language of the Oklahoma aggravating circumstance at issue – "especially heinous, atrocious, or cruel" – gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in *Godfrey*. . . .

Second, the conclusion of the Oklahoma court that the events recited by it "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court in *Godfrey*, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P.2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

Cartwright, 108 S. Ct. at 1859.

5. In Mr. Lambrix's case, as in *Cartwright*, what was relied upon by the jury, judge, and the Florida Supreme Court on direct appeal, did not guide or channel sentencing discretion. No "limiting construction" was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance before the jury and the error was not cured by appellate review of this aggravating factor. Clearly, under the principles of *Cartwright*, the [non]standards attendant to the application of the "heinous, atrocious, or cruel" aggravating circumstance in this case violate the eighth and fourteenth amendments.

6. An analysis of the facts of Mr. Lambrix's case and application of the pertinent law to those facts demonstrates that this aggravating circumstance was applied *in this case* in an unconstitutionally overbroad manner. An analysis of the application of this aggravating circumstance must begin with the Florida Supreme Court's original definition of the term "especially heinous, atrocious, or cruel." This circumstance was initially defined in *Dixon v. State*, 283 So. 2d 1 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. what is intended to be included are those capital crimes where the actual commission of a capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conciousless [sic] or pitiless crime which is unnecessarily tortous [sic] to the victim.

Id. at 9.

7. In its decision in *Tedder v. State, supra*, the Florida Supreme Court recognized that while "it is apparent that all killings are atrocious, and that appellant exhibited cruelty . . . still, we believe the legislature intended something *especially* henious [sic], atrocious, or cruel when it authorized the death penalty for first degree murder." *Id.* at 910, n.3 (emphasis added). On the heels of *Tedder* came *Halliwell v. State*, 323 So. 2d 557 (Fla. 1975), wherein the court again invalidated a finding of henious [sic], atrocious, or cruel because the court perceived "nothing more shocking in the actual killing than in the majority of murder cases reviewed by this Court." *Id.* at

561. The description of the murder, markedly similar to one of the instant case, was graphic:

> Appellant grabbed a 19-inch breaker bar and beat the [victim's] skull with lethal blows and then continued beating, bruising, and cutting the [victim's] body with the metal bar after the fatal injuries to the brain.

Id. at 561. Despite the obvious brutality of the crime, the court found the heinous, atrocious, and cruel aggravating circumstance inapplicable, "see[ing] nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." *Id.; cf. Simmons v. State*, 419 So. 2d 316, 319 (Fla. 1982) (Trial court's finding that bludgeoning murder was heinous, atrocious, or cruel reversed on appeal because "[t]here was no proof that the victim was aware that he was going to be struck" or that "the victim was subjected to repeated blows while living."); *see also Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983) ("Where death has been instantaneously inflicted on an unsuspecting victim, or where the manner in which the victim was murdered had not exceeded the atrocity and cruelty inherent in any murder, this . . . aggravating circumstance has not been found to apply").

8. The trial court's basis for the application of this aggravating circumstance was simply that "the facts speak for themselves." (R. 1355). An examination of those facts indicates that this was not the type of case "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies," *Dixon v. State*, 283 So. 2d 1, 9 (Fla. 1973), and that neither killing was heinous, atrocious, or cruel under the above interpretations.

9. According to the testimony of the State's medical examiner, the cause of Clarence Moore's death was "multiple crushing blows to the head," (R. 2064) causing multiple skull fractures, any one of which could have caused death and any one of which would have caused immediate unconsciousness (R. 2093). There was no evidence of struggle or lingering death. In all probability the victim died as a result of the initial blow. There was no evidence to indicate otherwise.

10. The cause of Alicia Bryant's death was "probably" manual strangulation (R. 2073), although the fragile hyoid bone in the front of the throat was not broken (R. 2078). The only other signs of physical trauma noted by the medical examiner were a three-centimeter laceration on the ear and, "on the right hand, a ring which had been badly distorted." (R. 2046). There was no testimony as to when these latter wounds were inflicted, nor any evidence showing that they in fact occurred before death and not during the burial.

11. Here, there was no evidence of "additional acts" which set the instant killings "apart from the norm of capital felonies." *Dixon*, 283 So. 2d at 9. No evidence was presented which demonstrated that either killing was the type of "consciousless or pitiless crime which is unnecessarily torturous to the victim" *id.*, and to which therefore the "heinous, atrocious, or cruel" aggravating circumstance, Fla. Stat. section 921.141 (5)(h), was applicable under the above-discussed established state law.

12. In *Zant v. Stephens*, 103 S. Ct. 2733, the United States Supreme Court recognized that "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: to circumscribe the class of persons eligible for the death penalty." *Id.* at 2743. In order to "minimize the risk of wholly arbitrary and capricious action," *Id.* at 2741, "aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty." *Id.* at 2742-43.

13. If Fla. Stat. section 921.141 (5) (h) can be properly applied to the facts of this case, it is being applied in precisely the unconstitutionally broad manner condemned in *Maynard*, and no longer serves its constitutional function of "genuine[ly] narrow[ing." It's application to Mr. Lambrix's case clearly violates the eighth and fourteenth amendments. He is thus entitled to the relief he seeks.

CLAIM XIV

THE FLORIDA SUPREME COURT HAS INTERPRETED "COLD, CALCULATED, AND PREMEDITATED" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THAT AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

All other allegations contained in this petition, its appendices, and the accompanying memorandum are fully incorporated herein by specific reference.

1. The eighth amendment analysis of *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Maynard v. Cartwright*,

108 S. Ct. 1853 (1988), discussed at length in Claim XIII, *supra*, applies with full force to this aggravating circumstance. As the argument herein and the legal analysis in Claim XIII, *supra*, demonstrates, the Florida Supreme Court's construction of this aggravating circumstance has broadened in such a manner and was applied to the facts of Mr. Lambrix's case in such a manner as to render its interpretation and application violative of the eighth and fourteenth amendments.

2. The trial court based its application of this factor to Mr. Lambrix's case on its findings that the "Defendant had not had one harsh word with either of the victims and, in fact, had not known them before that night," and that after the killings were concluded, Mr. Lambrix "went back into the trailer, washed up, and ate a plate of spaghetti" (R. 1355). The State's argument in support of the application of this aggravating circumstance had foreshadowed the trial court's theme: because, according to the prosecutor, Mr. Lambrix "came back in the trailer and proceeded to eat a plate of spaghetti" after the killings were completed, and because of the manner in which the bodies were later disposed of, Fla. Stat. sec. 921.141(5)(i) applied.

3. There was no factual basis for the finding of this aggravating factor, and its existence was thus not proven beyond a reasonable doubt. The findings made by the trial court regarding Mr. Lambrix's relationship with the victims if anything support a finding that the killings were spontaneous, and that the heightened degree of premeditation required for the valid application of this factor was therefore absent. Moreover, as discussed in Claims I and II, *supra*, Mr. Lambrix's intoxication at the

time of the offense would have negated the application of this aggravating factor, had the trial judge appropriately instructed the jury to or had he himself considered it.

4. The trial court's finding of the existence of this factor was also based on wholly improper considerations. The Florida Supreme Court has repeatedly held that a defendant's post-offense actions cannot form the basis for the application of aggravating circumstances. *See, e.g., Halliwell v. State*, 323 So. 2d 557, 561 (Fla. 1975); *Smith v. State*, 344 So. 2d 815, 918 (1977); *Washington v. State*, 362 So. 2d 658, 665 (Fla. 1978); *Blair v. State*, 406 So. 2d 1103, 1109 (Fla. 1981); *Herzog v. State*, 439 So. 2d 1372, 1380 (Fla. 1983); *Pope v. State*, 441 So. 2d 1073, 1078 (1983); *Trawick v. State*, 473 So. 2d 1235, 1240 (Fla. 1985). Thus, Mr. Lambrix's later actions and his alleged disposal of the bodies were irrelevant and improper factors upon which to base a finding of the "cold, calculated, and premeditated," or any, aggravating factor.

5. Again, if Fla. Stat. sec. 921.141(5)(i) can be properly applied to the facts of this case under state law, it is being applied in precisely the same unconstitutionally overbroad manner condemned in *Maynard v. Cartwright, supra*, and no longer "genuinely narrows." *See Zant v. Stephens, supra*. Its application to Mr. Lambrix violates the eighth and fourteenth amendments, and Mr. Lambrix is entitled to the relief he seeks.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CARY MICHAEL LAMBRIX, Petitioner,	)	CASE NO. ___
v.	)	EMERGENCY
RICHARD L. DUGGER, Respondent.	)	RESPONSE: CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION IMMINENT.

RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION, AND RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the State of Florida, by and through undersigned counsel, and hereby files this Response in Opposition to the defendant's Application for Stay and Response in Opposition to the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. s.2254. The State of Florida would show unto the Court as follows:

I.

The defendant was charged by indictment filed on March 29, 1983, with two counts of first-degree murder (R 20). At arraignment, Lambrix pled not guilty.

Trial by jury commenced on November 29, 1983. That trial resulted in a mistrial on December 9, 1983, when the jury could not reach a unanimous verdict. A second jury trial was held before the Honorable Richard M. Stanley, Circuit Judge. After deliberations, the jury found the defendant guilty as charged on

* * *

> constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

77 L.Ed.2d at 1100. The State of Florida submits that these proceedings, like the federal habeas proceedings discussed in *Barefoot v. Estelle*, are not vehicles to relitigate state trials. As will be demonstrated below, Lambrix is unable to show that any issue is likely to succeed on the merits. *See O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982), and *White v. Florida*, 458 U.S. 1301, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982).

In *Autry v. Estelle*, 464 U.S. 1, 104 S.Ct. 20, 78 L.Ed.2d 1 (1983), the United States Supreme Court declined to implement a rule calling for an automatic stay of execution where a petitioner's first habeas corpus petition had been involved. Similarly, the State of Florida submits that there is no justification for an automatic stay of execution merely because a habeas petition has been filed in this case. The state further submits that the instant case is not one which calls for the granting of a stay of execution.

IV.

It has long been the law in the State of Florida that a defendant may not raise via a motion pursuant to Rule 3.850, Fla. R. Crim. P., claims which were raised or should have been raised on direct appeal. *See e.g., Christopher v. State*, 416 So.2d 450 (Fla. 1982); *Raulerson v. State*, 420 So.2d 517 (Fla. 1982); *Meeks v. State*, 382 So.2d 673 (Fla.

1980); and *Alvord v. State*, 396 So.2d 194 (Fla. 1981). The purpose of motions pursuant to Rule 3.850 is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on a direct appeal. *McCrae v. State*, 437 So.2d 1388 (Fla. 1983). For example, in *Blanco v. State*, 507 So.2d 1377, 1380 (Fla. 1987), the Supreme Court held the following issues had been procedurally barred because they either were or should have been presented on direct appeal:

> 1. Did the trial court err in permitting appellant to call witnesses against the advice of counsel;
>
> 2. *Did the trial court conduct critical stages of the trial in the absence of appellant* or an interpreter;
>
> 3. Did the trial court err in questioning appellant concerning the presentation of his defense;
>
> 4. Did the instructions to the jury unconstitutionally denigrate the jury's role in recommending life or death;
>
> 5. *Did the trial court improperly instruct the jury on the number of jurors required to return a life recommendation;*
>
> 6. Did the trial court improperly rely on the conviction for armed burglary as an aggravating factor;
>
> 7. Did the trial court improperly rely on a previous conviction for armed robbery as an aggravating factor; and
>
> 8. Did the prosecutor use inflammatory closing arguments.

These issues were not cognizable in post-conviction relief. As can observed from the underlined issues above, Lambrix presented the same or similar types of issues to the State Court and, as in *Blanco*, these claims were properly summarily denied by the trial court.

As aforestated, we have the same situation presented as in *Blanco*. In his motion for 3.850 relief, the defendant alleges 14 grounds for relief; of these issues, only issues 1, 2, 6, 7, and 8 are appropriate for a 3.850 proceeding. All other issues were raised or should have been raised on direct appeal. *See, Blanco v. State, Id.* The issues procedurally defaulted include:

3. A *Booth v. Maryland* claim (should have been raised on direct appeal);

4. Purportedly erroneous jury instructions which allegedly made mitigating circumstances aggravating circumstances (should have been raised on direct appeal);

5. Failure to renew motion for change of venue (should have been raised on direct appeal);

9. Failure of the trial court to find mitigating circumstances (should have been raised on direct appeal);

10. Instructions concerning the recommendation by a majority of the jury (should have been raised on direct appeal);

11. Instructions which allegedly shifted the burden of proof (should have been raised on direct appeal);

12. A *Maynard v. Cartwright* claim concerning the heinous, atrocious or cruel aggravating circumstance (should have been raised on direct appeal);

13. The finding of the cold, calculated and premeditated aggravating circumstance (should have been raised on direct appeal); and

14. Double jeopardy because of the mistrial in the first trial of this cause (should have been raised on direct appeal).

The issues discussed above which should have been or were raised on direct appeal were properly summarily denied. Additionally, at the end of his pleading, the defendant injects "other claims" into these proceedings (defendant's Motion at p. 104-105). Obviously, the defendant has failed to allege facts sufficient even for the state to respond. These claims must be summarily dismissed, especially in light of the fact that amendment is not proper herein because the two-year bar of Rule 3.850 is applicable. In addition, federal habeas review of these claims is barred by virtue of the doctrine enunciated in *Wainwright v. Sykes*, 433 U.S. 72 (1976).

V.

Respondent denies each and every allegation indicating that the petitioner is entitled to relief. The State of Florida demands strict proof of petitioner's allegations. All of the claims discussed in this response to the federal habeas petition were raised either on direct appeal, motion pursuant to Rule 3.850, Fla. R. Crim. P., or state habeas corpus. Therefore, your respondent will not contest exhaustion of remedies on the issues which have

been raised both in the state proceedings and in this Honorable Court. However, should additional grounds be

* * *

VII.

Undersigned counsel has been advised by collateral counsel for the petitioner of the claims that will be raised in the instant habeas proceedings, to wit: several issues that were raised on direct appeal and all of the issues presented in the 3.850 motion and in the state habeas proceedings. Based upon these representations, the State of Florida will incorporate the responsive pleadings filed by the state as to these claims. Those responses are attached herewith and follow immediately. Specifially [sic], the pleadings attached herewith and incorporated as if set forth herein are the Brief of the Appellee on direct appeal filed with the Florida Supreme Court, the state's Response to Petition for Writ of Habeas Corpus (state habeas), and the Brief of Appellee from the denial of the Rule 3.850 motion (which is virtually identical to the state's Response in Opposition to Application for Stay of Execution, and Response in Opposition to Motion to Vacate Judgment and Sentence).

* * *

ISSUE XII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM BROUGHT PURSUANT TO THE DECISION RENDERED IN *MAYNARD V. CARTWRIGHT*.

The defendant next claims that he is entitled to 3.850 relief based upon the United States Supreme Court's recent decision in *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988). The United States Supreme Court considered only the narrow question of whether Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor has been interpreted by the Oklahoma Court of Criminal Appeals in an unconstitutionally broad manner. This claim, as are many of the others raised herein, is procedurally barred. This claim is not so novel that it couldn't have been raised previously. *See Dobbert v. State*, 409 So.2d 1053 (Fla. 1982). Also, in *Magill v. State*, 428 So.2d 649 (Fla. 1983), the court observed that our "especially heinous, atrocious or cruel" aggravating circumstance has been upheld against constitutional attacks. The court specifically noted:

> [3-6] We have provided guidance for determining whether section 921.141(5)(h) is applicable. As was noted in State v. Dixon, 283 So.2d 1 (Fla. 1973):
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be

> included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. Since Proffitt, our application of the above reasoning has not rendered the statute unconstitutionally vague and overbroad.

Inasmuch as a claim based upon the purported unconstitutionality of the "especially heinous, atrocious or cruel" aggravating circumstance has been available to capital defendants for many years, the failure to raise this claim previously results in a clear procedural bar.

The United States Supreme Court's granting of relief in *Maynard v. Cartwright, supra,* does not affect the Florida decisions. Relief in Maynard was based on the Oklahoma court's failure to define the terms heinous, atrocious and cruel. These terms have been defined in Florida. *See State v. Dixon, supra.* Moreover, the United States Supreme Court in *Proffitt v. Florida,* 428 U.S. 242, 254-256 (1976) upheld this aggravating circumstance in Florida against a vagueness attack and this was expressly noted in *Maynard* where the court compared *Proffitt* with *Godfrey v. Georgia,* 446 U.S. 420 (1980). This claim was properly summarily denied.

ISSUE XIII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THIS HONORABLE COURT HAS INTERPRETED THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE IN AN UNCONSTITUTIONALLY OVERBROAD MANNER.

As his thirteenth claim for relief, the defendant makes an argument similar to that immediately above, that is, that the Florida Supreme Court has interpreted an aggravating circumstance in an unconstitutionally overbroad manner. In this claim, petitioner contends that the "cold, calculated and premeditated" aggravating circumstance is unconstitutionally overbroad generally and as applied to this case. For the reasons expressed below, this claim must be summarily denied.

As was the case with claim XII, this is an example of a claim which should have been and could have been raised on direct appeal, and the failure to do so absolutely precludes collateral review. Alternatively, it must be observed that the Florida Supreme Court in the direct appeal of this case had the occasion to comment on the aggravating circumstances found in this case. After reviewing the record, the Florida Supreme Court specifically stated that "We agree with the trial judge and all of the parties involved that five aggravating circumstances apply to the murder of Moore and four aggravating circumstances apply to the murder of Bryant." One of those aggravating circumstances found as to both murders was that the capital felonies were committed in a cold, calculated and premeditated manner without any pretense of

moral or legal justification. *Lambrix v. State,* 494 So.2d 1143, 1148 (Fla. 1986).

As an additional basis for summarily denying this claim, it must also be observed that the defendant attempted to raise this claim before the Florida Supreme Court in his habeas petition. It should also be noted that the claim now raised in the 3.850 motion is virtually identical to the argument set forth in the habeas petition. The Florida Supreme Court held that this claim was without merit. For any of the reasons set forth above, but primarily because of the procedural default which has occurred in this case, this claim was properly summarily denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CARY MICHAEL LAMBRIX,	:	
Petitioner,	:	Civil Action
	:	No. 88-12107-
vs.	:	Civ-Zloch
RICHARD L. DUGGER,	:	
	:	
Respondent.	:	
	:	

AMENDMENT TO PETITION
FOR WRIT OF HABEAS CORPUS

Petitioner, Cary Michael Lambrix, files this his amendment to his Petition for Writ of Habeas Corpus dated November 30, 1988. This amendment is intended as a supplement to and not a substitute for the original petition.

CLAIMS I, II, IV, V, VI, IX and XXIII

INEFFECTIVE ASSISTANCE OF COUNSEL

The individual claims of inassistance of counsel should also be viewed as a whole. Though *Strickland v. Washington,* 466 U.S. 668 (1984), requires a habeas corpus petitioner to identify the individual acts or omissions that he claims fall below a standard of reasonable professional judgment, 446 U.S. at 690, the court also said that "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 694. Common sense tells us there can be instances where many smaller mistakes can be just as

damaging to the fairness of a trial as one larger mistake, even though when viewed in isolation the effect of the individual

* * *

> influence, conscious or subconscious, a victim impact statement admitted into evidence had on the sentencer. And the Supreme Court has recognized that where a reviewing court cannot confidently conclude that an error had no effect on the sentencing deliberations, it should not find errors in sentencing hearings harmless.

Simms, 520 N.E.2d at 313-14. The second reason the court provided was that:

> Similarly, given the powerful emotions expressed in the victim impact statements, we believe that it is reasonably likely that the circuit judge's consideration of this evidence may have affected his decision to impose the death sentence. It is therefore improper for us to find the error in this case harmless because we have no way of telling whether it was harmless or not.

Id. at 514.

Both of these points apply with equal force to the present case. No one can be inside the sentencing judge's brain. He has never announced that the letters from the parents of the victims played no role in his decision, and as a normal human being one would expect that he was in some way affected by the grief of a parent for a lost child. So long as *Booth v. Maryland*, 482 U.S. 496 (1987), is the law of the land, its mandate cannot be obeyed if we allow a sentence to remain in force where the sentencer was provided with the types of letters that were read by the trial judge in this case.

CLAIM XIII

APPICATION [sic] OF THE AGGRAVATING FACTOR OF "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" TO THE PRESENT CASE WAS IN VIOLATION OF THE RULE ADOPTED IN *MAYNARD V. CARTWRIGHT*.

Maynard v. Cartwright, 108 S.Ct. 1853 (1988), was not decided in a vacuum and must be read in light of the Supreme Court's prior decisions on this issue and in the general area of criminal law. During the same term the court also decided *Lowenfeld v. Phelps*, 484 U.S. 231 (1988), where it said: "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfeld*, 484 U.S. at 244. These narrowing standards cannot be vague ones, but rather ones that truly separate the person who receives the death sentence from others found guilty of murder who do not. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

It is petitioner's position that the jury in his case was not adequately instructed on this issue and that any post hoc narrowing construction by the trial court or an appellate court could not cure this defect. The law in Florida, at least since *Tedder v. State*, 322 So.2d 908 (Fla. 1975), is that once a jury recommends life imprisonment a court cannot overturn that recommendation unless "facts suggesting a sentence of death [are] so clear and convicing [sic] that virtually no reasonable person could differ." 322 So.2d at 910.

In *Ashton v. Kentucky*, 384 U.S. 195 (1966), the court said that "where an accused is tried and convicted under a broad construction of an Act which would make it

unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act." *Ashton*, 384 U.S. at 198. This standard is embedded in and derived from the general principle of particpatory [sic] democracy on which our system of government is based. The rule of *Ashton* was applied to death penalty jurisprudence in the concurring opinion in *Godfrey v. Georgia*, 446 U.S. 420 (1980), where it is said:

> In addition, I think it necessary to emphasize that even under the prevailing view that the death penalty may, in come [sic] circumstances, constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear tht [sic] it is the *sentencer's* discretion that must be channeled and guided by clear, objective, and specific standards. See ante, at 428. To give the jury an instruction in the form of the bare words of the statute – words that are hopelessly ambiguous and could be understood to apply to any murder, see ante, at 428-429; *Gregg v. Georgia*, 428 U.S., at 201, would effectively grant it unbridled discretion to impose the death penalty. Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury

> would have so exercised its discretion if it had known the law.

Godfrey, 446 U.S. at 436-437 (Marshall and Brennan, JJ., concurring).

The totality of the jury instruction on this issue was: "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: . . . Next, that the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel." (R2662-63). This instruction is practically identical to the one given in *Maynard v. Cartwright*. The Florida Supreme Court said in *Riley v. Wainwright*, 517 So.2d 656, 659 (Fla. 1987): "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by the procedure." Here, the jury instruction was unconstitutional and this tainted the entire sentencing process.

As further indication that this aggravating factor has not genuinely distinguished capital defendants from those receiving life in prison, petitioner calls the court's attention to *Scull v. State*, 533 So.2d 1137 (Fla. 1988), and *Rembert v. State*, 445 So.2d 337 (Fla. 1984). In *Scull*, the court held that the evidence did not support this aggravating factor where the victim died from a single blow to the head. 533 So.2d at 1142. In *Rembert*, the jury was told "that *Rembert* had hit the victim 'once or twice' and heard the medical examiner testify that the victim could have been hit as many as seven times or as few as one time." 445 So.2d at 339. This was held not to justify the aggravating factor of heinous, atrocious or cruel.

These cases should be considered in addition to those cited at pages 146-148 of the original petition as an indication that the standard in Florida allowed for an arbitrary application of this aggravating factor in this particular case.

CLAIM XIV

APPLICATION OF THE "COLD, CALCULATED, AND PREMEDITATED" FACTOR TO THE PRESENT CASE WAS ARBITRARY AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This factor was supposed to be reserved for a heightened form of premeditation, beyond the premeditation necessary to support a conviction for first degree murder. *Hamblen v. State*, 527 So.2d 800, 805 (Fla. 1988). This heightened form of premeditation has been seen in a careful plan or prearranged design to kill, *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), or executions, organized crime or underworld killings. *Garron v. State*, 528 So.2d 353, 361 (Fla. 1988). Some evidence of prearrangement is necessary. *Amoros v. State*, 531 So.2d 1256 (Fla. 1988).

The facts of the instant case should not have fallen within the ambit of this heightened premeditation. For example, even where the defendant goes to the victim's home with a .38 caliber pistol and shoots the victim, that is not enough for a finding of a cold, calculated and premeditated murder. *Lloyd v. State*, 524 So.2d 396, 403 (Fla. 1988). To place the present case within the category of a cold and calculated killing is not only arbitrary, but it would remove from this factor its characteristic as a means of genuinely narrowing the class of death-eligible

persons and truly separating them from those merely found guilty of first degree murder. The defendant had never met the victims before the night of the crime, he had no time to form the type of heightened premeditation that this factor involves and the circumstances of the defendant being "high" on alcohol at that time strongly militate against this being a careful plan or prearranged design to kill.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CARY MICHAEL LAMBRIX, Petitioner,	:	Case No. 88-12107
vs.	:	
RICHARD L. DUGGER, Respondent.	:	

RESPONSE IN OPPOSITION TO AMENDMENTS TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Repondent [sic], Richard L. Dugger, by and through the undersigned Assistant Attorney General, and hereby files this response in opposition to the amendments to the petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The respondent would show unto this Court as follows:

Claims I, II, IV, V, VI, IX and XXIII

Ineffective Assistance of Counsel

In order to be entitled to relief under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a criminal defendant must demonstrate both deficient conduct on the part of his attorney and prejudice resulting from that deficient conduct. This petitioner cannot show either deficiency or prejudice. His claim is in essence one which says an expert on intoxication should have been called at trial, and that expert's testimony

would have been sufficient to reduce the degree of murder to second degree. This argument fails to take into consideration the true facts and circumstances of this

* * *

Additionally, Respondent submits any claim under *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1988) and *South Carolina v. Gathers*, 490 U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), is procedurally barred since no objection was made at trial. *See, Parker v. Dugger*, 14 F.L.W. 557 (Fla. Case Nos. 74,749 and 74,888, Opinion filed October 25, 1989). It should also be noted that petitioner is complaining of the inclusion into the pre-sentence investigation report of statements by family members of the victim. This information was never presented to the jury, and it is clear that the trial judge did not use this information in his order supporting the death sentence.

Claim XIII

Aggravating Circumstance:
Heinous, Atrocious, or Cruel

Again, this is an issue which has been procedurally defaulted by petitioner's abandonment of the claim on appeal from the denial of 3.850 relief, and by petitioner's failure to object to the jury instructions concerning heinous, atrocious or cruel at trial.

The Supreme Court's decisions of *Maynard v. Cartwright*, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) and *Lowenfeld v. Phelps*, 484 U.S. 231, 108 S.Ct. ___, 98 L.Ed.2d 568 (1988), do not entitle petitioner to any relief.

As the Florida Supreme Court noted in *Smalley v. State*, 546 So.2d 720 (Fla. 1989), the Florida aggravating circumstance has been defined by the court's opinion in *State v. Dixon*, 283 So.2d 1 (Fla. 1973). This fact was noted with approval in the *Cartwright* opinion. This claim was also rejected by the Eleventh Circuit Court of Appeal in *Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir. 1989).

Claim XIV

Cold, Calculated and Premeditated

This claim, as are others, has been procedurally defaulted, both by the failure to raise the claim on direct appeal and by abandonment of the issue on appeal from the denial of 3.850 relief.

Petitioner is in essence asking this Court to reweigh the factual findings made by the trial court in support of the aggravating circumstance of cold, calculated and premeditated. The Fifth Circuit Court of Appeal in *Spinkellink v. Wainwright*, 578 F.2d 582, 604-605 (5th Cir. 1978), indicated it was not the function of the federal courts to retry the aggravating and mitigating circumstances.

* * *

Claim XIX

Brady Claim

Petitioner raised in his 3.850 motion an allegation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); however, that issue was abandoned

by petitioner by his failure to raise the issue on appeal from the denial of 3.850 relief.

Respondents will rely on the argument made at page 93 of the original response for the merits of this claim.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-12107-CIV-ZLOCH

CARY MICHAEL LAMBRIX,

Petitioner,

vs.

RICHARD L. DUGGER,

Respondent.

_____/

FINAL ORDER

THIS CAUSE comes before the Court upon the Emergency Petition For Writ of Habeas Corpus (DE 1) and its Amendment (DE 51), brought pursuant to 28 U.S.C. section 2254, by Cary Michael Lambrix, an inmate who has been sentenced to death and who is currently held in custody by the Respondent. This Court held an evidentiary hearing in this matter on certain claims asserted by the Petitioner in his Emergency Petition For Writ of Habeas Corpus and its Amendment and said hearing commenced on August 12, 1991, and lasted five (5) days. This Court has carefully considered all the evidence and testimony presented at said hearing, and has reviewed all the papers filed by both parties, as well as having completed a review of the entire trial transcript.

PROCEDURAL HISTORY

On March 29, 1983, Cary Michael Lambrix was indicted for two counts of first-degree murder. At the conclusion of his first trial, the jury was unable to reach a verdict, and a mistrial was declared on December 9, 1983.

The second jury trial resulted in verdicts of guilty as to both counts which were handed down on February 24, 1984. The penalty phase of the trial was held on February 27, 1984, and the jury recommended the death penalty on both counts. The trial judge determined that four aggravating circumstances existed as to one victim and five existed as to the other victim, and finding the existence of no mitigating circumstances, he imposed the death penalty as to both counts on March 22, 1984.

Petitioner took a direct appeal from these sentences and raised five grounds which he believed entitled him to relief: (1) the jury selection process was not representative and the subsequently empanelled jury was conviction-prone; (2) the trial court erred in excusing a juror for cause because she refused to impose the death penalty; (3) the trial court erred in restricting the cross-examination by defendant of the state's key witness Frances Smith; (4) the trial court erred in restricting the cross-examination of the state's witness Connie Smith; and (5) the trial court erred in permitting a medical expert to testify that the cause of death of one of the victims was homicide.

On September 25, 1986, the Florida Supreme Court affirmed the judgments and death sentences. *Lambrix v. State*, 494 So. 2d 1143 (Fla. 1986). Petitioner did not file a petition for writ of certiorari before the United States Supreme Court.

On September 29, 1987, Petitioner filed a *pro se* petition for writ of habeas corpus in state court. Counsel from the Capital Collateral Representatives was appointed to assist the Petitioner and appointed counsel supplemented

his state habeas petition. The petition alleged that the performance of appellate counsel was ineffective. This petition was denied on August 18, 1988. *Lambrix v. Dugger*, 529 So. 2d 1110 (Fla. 1988). The death warrant was signed on September 28, 1988.

On October 27, 1988, Petitioner filed an emergency motion to vacate his sentence pursuant to Florida Rule of Criminal Procedure 3.850, and an emergency motion to stay execution. These motions were denied by the trial court on November 18, 1988. No evidentiary hearing was held. Petitioner appealed the denial of the 3.850 motion and filed an emergency motion to stay execution before the Florida Supreme Court which denied all relief. *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988).

Finally, Petitioner petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. section 2254. Subsequent to the filing of the instant petition, Petitioner also filed an additional petition for writ of habeas corpus with the Florida Supreme Court alleging that the Collateral Capital Representative who was appointed to assist him was ineffective for failing to raise a claim in Petitioner's motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The Florida Supreme Court once again denied relief, *Lambrix v. State*, 559 So. 2d 1137 (Fla. 1990), and after a hearing, this Court permitted collateral counsel to withdraw, and appointed new counsel to represent Petitioner. (DEs 39, 41, 42).

DISCUSSION

In his Emergency Petition For Writ of Habeas Corpus, and its Amendment, Petition raises twenty-four enumerated claims and four additional unnumbered claims. This Court ordered that an evidentiary hearing be held on claims numbered: I, II, III, IV, V, VIII, IX, XXI, XXIII, XXIV, and an additional unnumbered claim alleging the ineffective assistance of a psychiatrist. At the evidentiary hearing, this Court decided not to hear evidence and testimony regarding the additional unnumbered claim alleging the ineffective assistance of a psychiatrist. The great majority of those claims set forth above deal with the purported ineffective assistance of counsel rendered by both trial and appellate counsel with respect to many stages of the representation of Petitioner.

Respondent asserts that claims III, IV, V, IX, X, XI, XII, XIII and XIV are procedurally barred, thus according to Respondent, this Court cannot conduct a review of these claims on the merits. However, for reasons set forth below, we find that the procedural default rule cannot be applied in this case.

I. PROCEDURAL DEFAULT

The Respondent, Richard L. Dugger, takes the position that Petitioner's claims numbered: III, IV, V, IX, X, XI, XII, XIII and XIV are "procedurally barred" because the Petitioner "abandoned" these claims on appeal of the Circuit Court's denial of his Motion To Vacate pursuant to Florida Rule of Criminal Procedure 3.850 before the Florida Supreme Court.

The procedural default rule, or "procedural bar" as it is commonly referred to, is a rule which evolved out of considerations of comity between the federal and state sovereigns and concerns for the orderly administration of justice. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Pitts v. Cook*, 923 F.2d 1568, 1571 (11th Cir. 1991). Simply stated, the procedural default rule is a well-established principle that prohibits a federal court from reviewing issues on the merits where a state court has already decided that same issue on state law grounds which are independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 500 U.S. ___, 111 S. Ct. 2546 (1991). The state law applied may be either substantive or procedural. *Id.*

Because problems arise when a state court decision is ambiguous and the decision appears to rest upon both federal and state law, the Supreme Court, in a direct review case codified the rule that where a state court "clearly and expressly [stated] that [it's decision] is . . . based on bona fide separate, adequate, and independent [state law] grounds," such decision would not be reviewed by a federal court. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). In *Harris v. Reed*, 489 U.S. 255 (1989), the Supreme Court applied the "plain statement" rule from the *Michigan v. Long* decision to cases involving collateral review. The *Harris v. Reed* decision instructed federal courts deciding petitions for writ of habeas corpus to presume that no independent and adequate state law ground formed the basis for the state court's decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any

possible state law ground is not clear from the face of the opinion." *Id.* (quoting *Michigan v. Long*, 463 U.S. at 1040-1041). The predicate to the application of the *Harris* presumption is that the last state court decision in the case appears to rest primarily upon or be interwoven with federal law. *Coleman*, 111 S. Ct. 2546 (1991). According to the *Coleman* Court, the presumption from *Harris* and *Long* does not apply in every case – it only applies where the state court decision contains the requisite federal overtones. *Id.* When the imposition of a procedural bar is appropriate, a petitioner can only avoid such an application if he is able to demonstrate "cause" for the procedural default noted by the state court and "prejudice" from the alleged denial of his constitutional rights. *Harris v. Reed*, 489 U.S. 255 (1989); *Wainwright v. Sykes*, 433 U.S. at 87.

Generally, we are able to discern from the face of the last state court's opinion which addressed a petitioner's claims what grounds were relied upon. However, there are instances where the federal court must look beyond the text of the state court decision to discover its basis. For example, in *Coleman*, the state court decision simply granted a motion to dismiss filed by the State, but an examination of the motion revealed that it rested upon state procedural grounds. In the instant case, the resolution of the procedural bar issue is [sic] entails a review of the events surrounding Petitioner's appeal of the denial of his 3.850 motion.

Petitioner filed a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850 which was denied on the merits by the Circuit Court without an evidentiary hearing. Subsequently, Petitioner filed a Notice of Appeal

from the denial of the motion to vacate on November 23, 1988. At this time, Petitioner's death warrant had been signed and his execution was scheduled for December 2, 1988. On November 28, 1988, Petitioner filed a motion entitled Appellant's Emergency Motion For Stay of Execution on Appeal of the Denial of His Motion For Fla. R. Crim. P. 3.850 Relief with the Florida Supreme Court. Within the Appellant's Emergency Motion For Stay Of Execution, Petitioner requested that the Florida Supreme Court stay execution pending the disposition of the appeal of the denial of his 3.850 appeal. Petitioner noted that the record of the 3.850 motion had not yet been filed and stated: "Mr. Lambrix also herein respectfully requests that the Court allow a proper, orderly, and reasonable schedule for the filing of the briefs." (DE 11).

The Appellant's Emergency Motion For Stay Of Execution stated that the motion to vacate pursuant to Florida Rule of Criminal Procedure and its supplement was appended to the Emergency Motion For Stay of Execution for the Florida Supreme Court's consideration. The body of the Emergency Motion For Stay Of Execution discussed two claims as examples of why a stay of execution was appropriate. Petitioner's counsel specifically stated in the Motion:

> Time constraints have made it impossible for undersigned counsel to properly brief Mr. Lambrix's claims. Counsel has, however, in the preceding section . . . discussed one of the most glaring errors in the lower court's order. (footnote 8) . . . This motion has been drafter (sic), however, in order to demonstrate that a stay of execution (sic), proper briefing and proper appellate resolution are necessary in this action. (DE 11).

In a subsequent passage of the Appellant's Emergency Motion To Stay Execution, Petitioner again recites his desire to: "be provided a reasonable opportunity to brief the issues . . . " (DE 11). A thorough reading of the Appellant's Emergency Motion To Stay Execution discloses Petitioner's counsel request for additional time in order to properly brief the other issues raised in the 3.850 motion.

On November 30, 1988, the Florida Supreme Court in *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988) affirmed the trial judge's order denying the motion for postconviction relief and declined to extend the stay of execution any further than noon of December 2, 1988. The Florida Supreme Court does not appear to have requested briefing from either party and in its opinion the Court stated:

> Lambrix's motion asserted a number of claims. However, his appeal addresses only two issues, both of which are related to his consumption of alcohol. *Id.* at 1152.

Respondent relies upon this language in order to assert that Petitioner did not properly bring his other claims before the Florida Supreme Court. Because Petitioner "waived" the assertion of these claims, Respondent contends, they are procedurally barred and cannot be reviewed on the merits by this Court. Respondent has informed the Court that the Florida Supreme Court considered the motion for stay as Petitioner's brief before that court and has directed our attention to the case of *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990) where the Florida Supreme Court stated:

Duest also seeks to raise eleven other claims by simply

> referring to arguments presented in his motion for postconviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived. *Id.* at 852.

Several subsequent cases, citing the *Duest* opinion, have taken this same approach. *See Kight v. Dugger*, 574 So. 2d 1066, 1073 (Fla. 1990) ("Finally, alleged instances of ineffectiveness which Kight attempts to raise by merely directing our attention to his motion for postconviction relief are deemed waived."); *Roberts v. State*, 568 So. 2d 1255, 1260 (Fla. 1990) ("Other alleged instances of ineffectiveness which Roberts attempts to raise by merely referring to arguments presented in his motion for post conviction relief are deemed waived.")

In order to reach the conclusion urged by the Respondent this Court must find that the Florida Supreme Court did consider and was entitled to consider the Petitioner's Emergency Motion For Stay of Execution as an appellate brief on appeal of the denial of the 3.850 motion, and that the Florida Supreme Court applied the principles it codified two years later in the case of *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) in its decision in *Lambrix v. State*, 534 So. 2d 1151, 1152 (Fla. 1988). According to Respondent, the Florida Supreme Court implicitly held that Petitioner waived these additional claims because he failed to raise them in what it considered as

his appellate brief. Petitioner, on the other hand, contends that under the prevailing state rules, he had no obligation to file a brief, and did not file a brief, thus all the claims asserted in the 3.850 motion were necessarily before the Florida Supreme Court." Alternatively, Petitioner asserts that the claims were raised by the Petitioner's Motion For Stay of Execution and its appendices which included the 3.850 motion and its supplement, and the Florida Supreme Court erred when it refused to address these claims. Neither the Petitioner nor the Respondent was required to file any brief on appeal of the denial of the 3.850 motion when no evidentiary hearing was held. *See* Fla. R. App. P. 9.140 (1990); *Harmon v. Barton*, 894 F.2d 1268, 1273 (11th Cir. 1990). Rule 9.140 of the Florida Rules of Appellate Procedure provides:

> RULE 9.140 APPEAL PROCEEDINGS IN CRIMINAL CASES
>
> (g) Appeals From Summary Denial of Motion for Post-Conviction Relief Under Fla.R.Crim. P. 3.850.
>
> An appeal from an order denying relief under Fla.R.Crim. P. 3.850 without a hearing shall be commenced as prescribed by Rule 9.110. The clerk of the lower tribunal shall forthwith transmit to the court as the record conformed copies of the motion, order, motion for rehearing and order thereon, with a certified copy of the notice. *No briefs or oral argument shall be required* . . . . The court may request a response from the State before ruling. (Emphasis supplied).

The drafters of Rule 9.140 of the Florida Rules of Criminal Procedure appear to contemplate that the Court reviewing a summary denial of a 3.850 motion will do a

complete review without the benefit of briefs. Fla. R. App. P. 9.140 (1990). In *Harmon v. Barton*, 894 F.2d 1268, 1273 (11th Cir. 1990), this Circuit commented on Rule 9.140: "The Rule's assumption appears to be that most appeals from rulings without a hearing under Fla. R. Crim. P. 3.850 can be disposed of without briefs and without participation by the state." *Id.*

The State did file a brief before the Florida Supreme Court entitled Brief of Appellee (DE 13), and it contains a substantive response to each claim made by Petitioner in his 3.850 motion.

First, we are uncertain whether the Florida Supreme Court actually considered Petitioner's Emergency Motion To Stay Execution as an appellate brief. However, assuming that they did, we have not found anything in Florida law which would permit them to do so without providing notice to the parties that the court would consider motions filed during the pendency of the 3.850 appeal as appellate briefs subject to a waiver doctrine.

We find that the Petitioner did not file an appellant's brief on appeal of the denial of the 3.850 motion, rather, he filed his Emergency Motion To Stay Execution in an effort to obtain more time to brief the 3.850 issues on appeal. For reasons which were not set forth by the Florida Supreme Court, it refused to consider all but two claims. We have applied the principles set forth in both *Harris v. Reed*, 489 U.S. 255, 263 (1989), and in *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), and we have searched but could not find in this case, either a "plain statement" applying a state procedural default doctrine, nor could we find any application of a state procedural device

discernible by reference to the order of the trial court denying the 3.850 motion. We do not have an "ambiguous" state court decision, which appears to rest upon both federal and state law. With respect to the issues in question, there is no statement whatsoever. We do not believe that the *Coleman* decision permits the imposition of a procedural bar where no state court has addressed a claim on procedural grounds. Because the Circuit Court order denied the 3.850 motion on the merits, and the Florida Supreme Court denied two claims, and failed to recognize or address the other claims, both the Harris and Coleman decisions permit this federal court to presume that no independent and adequate state law ground formed the basis for the state court's decision " . . . [ ] [because] the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* (quoting *Michigan v. Long*, 463 U.S. at 1040-1041). Thus no procedural bar exists.

Unlike *Duest v. Dugger* and its progeny, the Florida Supreme Court in *Lambrix v. State did not* state that it deemed the claims within the appendix and the references thereto in the Emergency Application to have been waived. In *Duest*, care was taken to explicitly dispose of the referenced but unbriefed claims on the grounds of waiver. Such disposal satisfies the principles set forth in both *Harris v. Reed*, 489 U.S. 255 (1989), and *Coleman v. Thompson* 500 U.S. ___, 111 S. Ct 2546 (1991). In the instant petition, the Florida Supreme Court was silent regarding Petitioner's other claims. *See Lambrix v. State*, 534 So. 2d 1151, 1152 (Fla. 1988). We have found no cases prior to 1990 which have stated the *Duest* proposition. In fact, the *Duest* opinion cites no authorities for the proposition it

sets forth. In addition, the *Duest* case differs significantly from the instant case because Duest's appeal was subsequent to a hearing held in state court, and Duest actually did file an appellate brief. Most importantly, the language from the *Duest* opinion did not act to procedurally bar the petitioner in the *Duest* case on subsequent collateral review because as a procedural bar, the "waiver" rule cited without authority in *Duest v. State* had not been consistently or regularly applied. *Duest v. Dugger*, No. 90-6045 (S.D. Fla. September 14, 1990). For all of these reasons we find the principles set forth in the *Duest* case inapplicable here.

Even if this were to be considered a procedural bar, Petitioner has demonstrated to the satisfaction of this Court that it was not consistently and regularly applied. Only " 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. ___, 111 S.Ct 850, 112 L.Ed. 2d 935 (1991); *see also Johnson v. Mississippi*, 486 U.S. 578, 588-589 (1988) ("we cannot conclude that the procedural bar relied on by the Mississippi Supreme Court in this case has been consistently or regularly applied. Consequently, under federal law it is not an adequate and independent state ground . . . "). The Supreme Court has declined to apply a state procedural default rule where "even though the rule appeared 'in retrospect to form part of a consistent pattern of procedures,' [ ] the defendant in that case could not be 'deemed to have been apprised of its existence.' " *Ford*, 112 L.Ed. 2d at 949. Indeed, the treatment accorded to Petitioner's Emergency Application was an aberration. Petitioner has established

that the uniform practice of the Florida Supreme Court was to consider all the claims raised and denied in the 3.850 motion, notwithstanding the fact that the Motion or Request for Stay of Execution only addressed several of the claims. In addition, as noted above, the *Duest* principles were rather unique when set forth in 1990, and were not in existence at the time of Petitioner's appeal of the denial of the 3.850 motion.

We also wish to note that Respondent has urged this Court to apply other procedural default principles and bar Petitioner's claims on the grounds that certain claims were not raised on direct appeal. (DE 16, Supplement To The Response In Opposition To Petition For Writ Of Habeas Corpus). This argument has no merit because as set forth above, no state court has ever held that Petitioner's claims were procedurally defaulted due to his failure to raise them on direct appeal. *See Lambrix v. State*, 494 So. 2d 1143 (Fla. 1986); *Lambrix v. State*, 529 So. 2d 1110 (Fla. 1988); *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988). Having determined the procedural default rule is inapplicable, we proceed to examine the merits of each claim.

The Petition For Writ of Habeas Corpus (DE 1) and its Amendment raise issues involving constitutional violations which are also raised in the context of the ineffective assistance of counsel claims. In order to intelligently discuss the ineffective assistance of counsel claims, we have first addressed these several substantive claims which pertain to the ineffective assistance claims.

II. CHANGE OF VENUE AND INDIVIDUALIZED VOIR DIRE

Petitioner contends that both individualized voir dire and a change of venue were constitutionally mandated due to the pretrial publicity surrounding his trial, and the trial judge's denial of this request deprived him of a fair trial. Petitioner originally moved for both individualized voir dire and a change of venue at the outset of his first trial and his motions were denied by the trial court. At the second trial, trial counsel renewed the previously made motions and both motions were also denied by the trial court. Petitioner contends that the isolated Glades community had been saturated with pretrial publicity regarding the homicides and the problem of pretrial publicity was magnified because the case was tried twice. Petitioner claims that the entire venire panel in the second trial knew that there was a first trial.

A defendant's right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based on the evidence developed at the trial" is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Woods v. Dugger*, 923 F.2d 1454, 1456 (11th Cir. 1991). Where a trial court is unable to empanel an impartial jury due to prejudicial pretrial publicity which has so inflamed a community, a change of venue or a continuance is required. *Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986). However, this Circuit does not equate impartiality with complete ignorance and has stated that "if jurors can lay aside preconceptions and base their verdict on the evidence

adduced at trial, they need not be completely unaware of the facts of a given case." *Bertolotti v. Dugger*, 883 F.2d 1503, 1521 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 3296 (1990). To prevail on a claim that he was deprived of a fair trial due to prejudicial pretrial publicity, Petitioner bears the burden of demonstrating either that he was "actually prejudiced by the selection of this jury or that the factual circumstances of this case require the application of a presumption of prejudice." *United States v. De La Veca*, 913 F.2d 861, 864 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2011 (1991). This test applies to claims involving solely pretrial publicity and to claims involving prejudicial "interference" with the trial process. *Woods*, 923 F.2d at 1457 (Eleventh Circuit refused to conduct separate analysis for claims focusing on pretrial publicity as opposed to claims focusing upon questionable security measures taken during trial).

A. Actual Prejudice

Actual prejudice exists only when one or more jurors held an opinion as to the defendant's guilt before trial and were unable to put that opinion aside and render a verdict based solely upon the evidence adduced at trial. *Id.* at 865; *Cummings v. Dugger*, 862 F.2d 1504, 1509 (11th Cir. 1989), *cert. denied*, 494 U.S. 1111 (1989). The record must reveal the actual prejudice or it must be demonstrated at the evidentiary hearing. A trial court's finding of impartiality can only be overturned if a reviewing court finds "manifest error." *Cummings*, 862 F.2d at 1509.

We have considered the testimony of Petitioner's expert witness in the field of homicide and death penalty

cases, Roy Black, Esq., with respect to this claim although his qualifications and testimony relate to attorney conduct. Mr. Black testified that actual prejudice could be demonstrated because Jurors, Snyder, Biro, Bailey, Walsh and Winburg admitted to reading some newspaper articles regarding the trial during jury selection. The following colloquys occurred between each of the respective jurors and the prosecutor:

> MR. McGRUTHER: Reading that material, have you formed any opinion at this point as to the guilt or innocence or anything else involved in this trial?
>
> MR. SNYDER: I really can't say. I don't know. I usually think of the police doing their work right. That's the way I feel about it. I usually believe the police do the work. That's my feeling.
>
> MR. McGRUTHER: Would you keep an open mind through the trial and listen to the evidence as presented:
>
> MR. SNYDER: I think I would. (Tr., Vol. 9, p. 1472).
>
> MR. McGRUTHER: Newspapers again. Have you formed any fixed opinions as to any issues in this case, whether as to the guilt or innocence or any other issues?
>
> MISS WALSH: No sir. (Tr., Vol. 9, p. 1472).
>
> MR. McGRUTHER: And ma'am, have you at this point reached any fixed opinions as to any issues in this matter, as to the guilt or innocence or any other issue?

> MISS BIRO: haven't thought about it. I consider myself a fair and open minded person.
>
> MR. McGRUTHER: You read that article? How may others have read that article in this morning's News-Press? You understand again what was in the News-Press is not evidence in this trial?
>
> MR. BAILEY: No.
>
> MR. McGRUTHER: Do you feel that you could put that article out of your mind and decide this case strictly on what was presented here?
>
> MR. BAILEY: Yes.
>
> MR. McGRUTHER: In the courtroom?
>
> MR. BAILEY: Yes.
>
> MR. McGRUTHER: Because of your stepson is a law enforcement officer in this county, do you have any fixed opinions regarding this case?
>
> MR. WINBURN: No.
>
> MR. McGRUTHER: Do you feel you can be fair and impartial despite that?
>
> MR. WINBURN: Yes.

Of course, throughout the voir dire process some members of the venire expressed an opinion as to Petitioner's guilt but all of these individuals either stated that they could put aside any opinion and base a verdict solely upon the evidence, or were excused from jury service. (Tr., Vol. 9, p. 1476, 1531-1536, 1566-1567). From our review of the transcript we were unable to discern any evidence of actual prejudice as to each of the five jurors listed above or any others.

B. Presumed Prejudice

Presumed or inherent prejudice arises in those rare and extreme situations where "pretrial publicity renders 'virtually impossible a fair trial by an impartial jury drawn from the community.' " *United States v. De La Vega*, 913 F.2d at 865; *Bundy v. Wainwright*, 850 F.2d 1402, 1425 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989). In order to "presume jury prejudice due to pretrial publicity, the publicity must be "sufficiently prejudicial and inflammatory" and it must "saturate[ ] the community where the trial was held." *Bundy*, 850 F.2d at 1424. In order to demonstrate presumed prejudice, Petitioner must prove that an "unacceptable risk [was] presented of impermissible factors coming into play." *Woods*, 923 F.2d at 1457. The Petitioner must make an "extensive evidentiary showing" in order to obtain relief. *De La Vega*, 913 F.2d at 865. Community awareness of the crimes and Petitioner's alleged involvement is not enough to satisfy this heavy burden. *Id.*; *see also Bundy*, 850 F.2d at 1425 (prejudice is not presumed just because defendant's criminal history is well-publicized). Media coverage which is mostly factual in nature does not create the "sort of inflamed community atmosphere which courts deem presumptively prejudicial." *Id; see also Bundy*, 850 F.2d at 1425. In other words, purely factual accounts of the incident and trial do not constitute the "impermissible factor" referred to in the *Woods* decision. *Woods*, 923 F.2d at 1457. However, where media coverage contains inflammatory or prejudicial remarks by law enforcement or the prosecutor, or other inflammatory material, it may rise to the level of inherent prejudice. *Coleman v. Kemp*, 778 F.2d 1487; *see also Jordan v.*

Lippman, 763 F.2d 1265, 1268 (11th Cir. 1985) (where publicity included over 50 newspaper articles, imputations of guilt by the Governor, and racially prejudicial overtones, prejudice was presumed).

In the instant case, no such "extensive evidentiary showing" was made. Petitioner introduced the newspaper articles which were published in conjunction with the arrest and two trials of the Petitioner. Although the articles were numerous, the majority are very brief accounts of events which occurred in the period leading up to or during the trials. In addition, our review of these articles reveals that they are mainly fact-based. (Pet.'s Comp. Ex. 32). While it is true that several articles reference Petitioner's status as an escaped convict, the articles also state that the underlying conviction was for passing worthless checks. (Pet.'s Comp. Ex. 32). According to the legal precepts set forth above, Petitioner has not met the requisite evidentiary burden, and has failed to demonstrate that that [sic] the pretrial publicity was "sufficiently prejudicial and inflammatory." Petitioner simply has made no showing that this publicity "saturated the community" making "impossible a fair trial by an impartial jury drawn from the community."

Where a presumption of prejudice arises, voir dire, conducted in a sufficient manner may rebut such a presumption. *Cummings v. Dugger*, 862 F.2d at 1506, n.6; *see also Coleman v. Kemp*, 778 F.2d at 1541, n.25. Ordinarily, the conduct of voir dire is a matter entrusted to the sound discretion of the trial judge, but in cases where pretrial publicity is extensive, such discretion is limited by the need to protect the defendant's constitutional rights. *Cummings v. Dugger*, 862 F.2d at 1507. Individualized voir

dire is a preferred method of screening out potentially partial jurors. *See Cummings*, 862 F.2d at 1508 ("Individual voir dire allows the trial court to probe the effect of any adverse publicity on the juror and insulates the jurors from one another's prejudicial comments"); *Jordan v. Lippman*, 763 F.2d at 1277 ("voir dire is the key element in the trial court's constitutionally-mandated search for juror impartiality"). However, individualized voir dire would have only been required in this case were we to find that the community had been saturated with negative publicity and that the voir dire process conducted by the trial judge was inadequate. *Id.; see also United States v. Davis*, 583 F.2d 190, 197 (5th Cir. 1978) ("[t]hough separate examination of jurors is sometimes preferable, it is not necessarily required. We recognize the district court's need for flexibility in interrogating jurors as to possible prejudice"); *see also Mu'Min v. Virginia*, 500 U.S. ___, 111 S. Ct. 1899, 114 L. Ed. 2d 493, 508 (1991) (individualized voir dire not required in case where publicity, although substantial, did not rise to level of a "presumption of prejudice"). We note that in both the *De La Vega* and the *Bundy* cases, individualized voir dire was permitted, but the publicity attendant to Petitioner's trial was not nearly as pervasive nor as prejudicial.

This case is not that rare, extreme case where the community was "saturated" with negative media coverage, *see Coleman v. Kemp*, 778 F.2d at 1491-1533 (where forty-plus pages of opinion recounts pretrial publicity, including press release by Sheriff stating that "[i]f I had my way about it, I'd have me a large oven and I'd precook them for several days " . . .). Neither is this a

case where events took place during the trial which further exposed jury members to negative publicity, *see Jordan v. Lippman*, 763 F.2d 1265 (racially motivated demonstrations took place during trial), and neither is this a case where the atmosphere in and around the courtroom became so hostile that it interfered with the trial process. *See Woods v. Dugger*, 923 F.2d 1454 (presence of uniformed officers at trial of defendant accused of killing prison guard coupled with pretrial publicity interfered with fair trial).

The voir dire inquiry in the instant case is the type of questioning criticized by the decision in *Coleman v. Kemp*, 778 F.2d at 1542-1543 (where only conclusory questions were asked, voir dire was insufficient). However, each case must be judged in light of the intensity and tone of the pretrial publicity to which the potential jurors were exposed. In the *Coleman* case where the community was saturated with extremely negative publicity over a prolonged period of time, a more probing voir dire is undoubtedly necessary. While it is true that the voir dire conducted by the trial judge could have been more exhaustive, our review of the record reveals that in light of the quantity and quality of the pretrial publicity existing in the community, both the prosecutor and defense counsel conducted a sufficient inquiry of each juror with respect to any pretrial publicity. The record reveals that an impartial jury was selected.

For all of the reasons set forth above, we find that Petitioner's claim IV which alleges that trial counsel was ineffective for failing to litigate, supplement and renew the change of venue and individualized voir dire motions, and claim V which alleges that the combination

of the trial judge's failure to grant the above motions and trial counsel's failure to renew them deprived him of an impartial jury are without merit. Because we have found that the extent of the pretrial publicity did not rise to the level necessary to require a change of venue, and because we have found that individualized voir dire was unnecessary, these claims must fail. With respect to claim IV, even if Petitioner could demonstrate deficient performance by trial counsel in this regard, which we do not pass upon, in light of our finding that neither a change of venue nor individualized voir dire was constitutionally mandated, Petitioner fails to establish any prejudice.

III. PETITIONER'S ABSENCE DURING "CRITICAL PROCEEDINGS"

Petitioner contends that he was absent during a portion of voir dire when four jurors were excused, and when stipulations were entered into regarding identification. He also contends that his absence was involuntary. Also, Petitioner contends that because he had been appointed as co-counsel, (Tr., Vol. 5, p. 891) such absence deprived him of his right to act as his own counsel.

Petitioner has the burden of proving his absence. *Hall v. Wainwright*, 805 F. 2d 945, 947 (11th Cir. 1986), *cert. denied*, 484 U.S. 905 (1987). "The right of a criminal defendant to be present at all critical stages of his trial is a fundamental constitutional right." *Hall v. Wainwright*, 805 F.2d at 947, *cert. denied*, 484 U.S. 905 (1987) (quoting *Proffitt v. Wainwright*, 685 F.2d 1227, 1260 n.49 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002 (1983)). If constitutional error is established, due to a defendant's absence during

a "critical stage of his trial" then the conviction must be reversed unless the error is harmless beyond a reasonable doubt. *Id.* The general qualification phase of jury selection is not considered to be a "critical stage" of a trial, thus a defendant's absence during the general qualification stage in jury selection would be harmless beyond a reasonable doubt. *Id.*; *Henderson v. Dugger*, 925 F.2d 1309, 1316 (11th Cir. 1991).

It is unclear from our examination of the record whether Petitioner was actually absent during the time period in question. Although this Court gave Petitioner the opportunity, he put on no testimony and evidence on this point at the evidentiary hearing. From the record, it appears that proceedings consisting of the excusal of two jurors, and the declaration of certain stipulations regarding identification took place in the trial judge's chambers. (Tr., Vol. 9, p. 1486). A member of the venire panel, Gary Clemons had approached both the prosecutor and defense counsel and told them that he had been "in the same cell [with Petitioner] for about two or three weeks" and that he and Petitioner "discussed a lot of the things about the case." (Tr., Vol. 9, p. 1486). Mr. Clemons's wife asked to be excused for the same reason. After this was revealed, the following colloquy transpired:

> MR. JACOBS: The defendant would have no objections if they want to be excused. Mr. Lambrix has indicated – as the defendant indicates, he has no objections to the two being excused. Go along with his wishes, if the Court wishes to excuse them for cause.
>
> THE COURT: You are excused for cause.

MR. McGRUTHER: Want to do the stipulations?

MR. JACOBS: Judge, we have agreed with Mr. McGruther –

THE COURT: Get the defendant back in here. I just want to make sure he is here. I don't want to do anything without him.

At that point in time certain stipulations were announced consisting of a stipulation to transport Petitioner's two brothers to the trial, and a stipulation identifying the body of Aleisha Bryant, a stipulation as to the chain of custody for the fingerprint cards, and the court's sua sponte excusal of two jurors for cause. However, it appears to this Court from its review of the transcript that the Petitioner was indeed present, and that the trial judge halted the departure of the Petitioner from the judge's chambers. The trial judge's statement that he did not want to do anything without the Petitioner as well as defense counsel's statement that "the defendant indicates, he has no objections to the two being excused" demonstrates that the defendant was not removed from the proceedings. Thus, this Court concludes that Petitioner was present during this aspect of the proceeding.

Nevertheless, even if Petitioner was absent, this stage of the proceedings was not critical, hence, Petitioner had no constitutional right to be present. From this Court's review of what transpired at that time, any error resulting from Petitioner's alleged absence would be harmless beyond a reasonable doubt.

For the reasons set forth above, we hold that Petitioner's claim IX alleging that trial counsel was ineffective for failing to secure Petitioner's presence during the above-mentioned stage of the proceeding must fail. Once again, even if we were to find that counsel's performance was deficient (assuming that we find that Petitioner was actually absent, a finding which we have not made), no prejudice was demonstrated.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner contends that both his trial and appellate counsel rendered ineffective assistance of counsel at various stages of the proceedings and has brought a variety of claims to this effect in the instant Petition (DE 1). After setting forth the appropriate standards which govern our inquiry, we shall address each claim in turn.

It is well-established that a petitioner seeking relief on the grounds that his counsel was ineffective must show both that counsel did not render reasonably effective assistance and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). "A reasonable probability" has been defined as "a probability sufficient to undermine confidence in the outcome." *King v. Strickland*, 748 F.2d 1462, 1463 (11th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985). This requires Petitioner to demonstrate: (1) that counsel's errors were so serious that counsel's representation fell below an objective standard of reasonableness, and (2) that such failure resulted in prejudice so as to deprive the petitioner of a fair trial, that is, a trial

whose result is reliable. *Strickland*, 466 U.S. at 687-688. The standard for judging ineffective assistance of counsel cases is identical at both the guilt and the penalty phases of a capital case. *King*, 748 F.2d at 1463.

The seminal *Strickland* decision instructs this Court to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," and a petition must specifically identify the "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. The *Strickland* Court also noted that:

> [t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions . . . when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. *Id.* at 691.

Petitioner bears the burden of overcoming the presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," and "the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689, 690. Counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-691.

A. Ineffective Assistance At Trial.

Petitioner, in claims numbered I, VI, IX, and XXIII alleges that his trial counsel rendered ineffective assistance of counsel by failing to sufficiently argue certain motions before the trial judge, by failing to investigate and present sufficient evidence of Petitioner's history of substance abuse, and by failing to challenge the testimony of a certain witness.

Petitioner contends that his trial counsel failed to present and investigate Petitioner's only defense, that of voluntary intoxication. The trial judge refused to give a jury instruction on voluntary intoxication because there was insufficient evidence on this point, and such refusal was affirmed on appeal. Petitioner contends that other evidence existed and was readily available to trial counsel regarding Petitioner's longstanding substance abuse problems.

At the evidentiary hearing, Petitioner presented a great deal of evidence relating to his substance abuse history, however, he presented little evidence regarding his state of intoxication on the night of the offense. The testimony from family members establishes that Petitioner had been drinking heavily several weeks prior to the date of the offenses, and the testimony of both Preston Branch and Debra Hanzel demonstrates that subsequent to the offense Petitioner was consuming a fair amount of alcohol. We do not believe the testimony of family members would have been admissible or relevant at trial because no family member could have stated that Petitioner was either consuming alcohol or intoxicated on the date in question. The affidavits which this Court

considered in determining whether to hold this evidentiary hearing contain statements to the effect that Petitioner had a reduced tolerance to the ingestion of any alcohol (DE 7, Exhibits 4, and 5), and this type of testimony may have had some relevance, but it was never presented in testimonial form so that this Court could properly assess its value, if any.

In addition, the testimony of any and all of the experts would have also been irrelevant and inadmissible because it was based upon self-serving hearsay statements of the Petitioner. *Holsworth v. State*, 522 So. 2d 348, 352 (Fla. 1988) ("expert testimony and opinion as to the effect of intoxicants on a defendant's mind are inadmissible absent some proof of ingestion other than the defendant's hearsay statements to the expert"); *Burch v. State*, 478 So. 2d 1050, 1051 (Fla. 1985) (defense not permitted "to use expert to improperly introduce hearsay statements that the accused had consumed large quantities of alcohol and that the expert assumed those statements to be true").

The only piece of non-self-reported evidence concerning Petitioner's intoxication on the date in question was related by witness Ronald Council, a law enforcement officer who saw Petitioner in Squeaky's bar on the night of the offense. Witness Council's testimony, which this Court finds to be somewhat contradictory and less than forthcoming, was simply that Officer Council, after viewing Petitioner for a matter of seconds, "assumed" that Petitioner was intoxicated because he was in a drinking establishment and was speaking loudly to a law enforcement officer. In addition, Petitioner's trial counsel, public defender, Kinley Engvalson, in his deposition

stated that any information regarding Petitioner's substance abuse history from either family members or mental health professionals could not have been presented at the guilt phase because it "[didn't] fit neatly into the defense. The defense that Cary gave us, [ ] – was basically, "I didn't do it." (Pet.'s Ex. 25, p. 24). Mr. Engvalson also stated that although other defenses were presented, the primary defense was that given to them by the Petitioner. (Pet.'s Ex. 25, p. 25). Also, Mr. Engvalson's testimony, by way of his deposition was that although Petitioner was questioned as to his alcohol consumption on the night of the offenses, Petitioner never gave defense counsel "a set of facts that supported [a voluntary intoxication defense] [ ]. He didn't say I was so drunk that night I didn't know what I was doing." (Pet.'s Ex. 25, p. 31).

Petitioner also asserts in claim VI of his petition that trial counsel rendered ineffective assistance of counsel by their failure to adequately cross-examine and impeach state witnesses, John Chezem, Preston Branch and Debra Hanzel. Additionally, Petitioner contends in claim XXIII that trial counsel was ineffective in their failure to "object to and properly litigate the unconstitutionality of the testimony of state witness Debra Hanzel." (DE 1).

During cross-examination, trial counsel elicited the fact that John Chezem was facing charges brought by the LaBelle State Attorneys' Office and utilized a deposition which Mr. Chezem had previously given in order to attempt to impeach his testimony. (Tr., Vol. 14, p. 2381-2385). As for Preston Branch, the jury was made aware of the relationship between Branch and key witness Frances Smith, (Tr., Vol. 14, p. 2403), and defense

counsel did use a deposition given by Preston Branch in his cross-examination, (Tr., Vol. 14, p. 2424). Trial counsel also questioned State witness Debra Hanzel about prior statements she made. Although trial counsel's cross-examination was less than ideal, we need not reach the issue of whether or not it was objectively unreasonable because we find that Petitioner has demonstrated no prejudice. The key witness against the Petitioner was Frances Smith and the trial testimony of these other three witnesses was not so critical that the failure to cross-examine them to the extent now desired by Petitioner resulted "in prejudice so as to deprive the petitioner of a fair trial." *Strickland*, 466 U.S. at 468.

We find Petitioner's claim that trial counsel failed to prevent or object to Ms. Hanzel's testimony consisting of statements allegedly made by Petitioner made in violation of Petitioner's Sixth and Fourteenth amendment rights, to be unpersuasive. Petitioner contends that Ms. Hanzel called Petitioner and asked him about the crime after Petitioner was formally charged, and entitled to counsel. Petitioner alleges that Debra Hanzel had been recruited to work as both an agent and a witness for the State prior to her phone call to Petitioner.

However, the testimony of state witness Debra Hanzel was that Petitioner *called* her collect, and after she accepted the charges, she asked him if it was true that "he killed a guy for the car. And he said that was the reason." (Tr., Vol. 14, p. 2449). Further, it was never demonstrated at trial that Debra Hanzel had been recruited to work as an agent of the state. Despite the fact that we permitted Petitioner to prove this claim at the evidentiary hearing

held, he presented no evidence and testimony on this point.

Petitioner attempted to introduce Petitioner's Exhibits 42, 43 and 44, Florida Department of Law Enforcement records and Sheriff's reports, into evidence in support of this claim but failed to lay the proper foundation. However, even if we were to consider these documents, their contents, the one sentence in Petitioner's Exhibit 44 which states that: "WI – Hanzel advised writer that Lambrix was going to call them every week and that she would work with H.C.S.O. any way possible" and the fact that Ms. Hanzel's telephone calls were monitored does not establish that Debra Hanzel was solicited by the State to obtain incriminating information. The documents submitted indicate that a "trap and trace investigative tool" was placed on Debra Hanzel's phone in order to determine the location of the Petitioner in case he telephoned Ms. Hanzel. (Pet.'s Ex. 42). In any event, even if Witness Hanzel was considered to be an agent of the state, and even if trial counsel was aware of and unreasonably ignored these documents, we find that no prejudice would result. The testimony of Debra Hanzel was not the significant testimony in this trial. In light of the other evidence presented, the result would not have differed had this testimony been excluded.

B. Ineffective Assistance At Penalty Phase

At the outset we wish to note that for the past three years that this case has been pending, Petitioner has phrased claim II, the ineffective assistance at the penalty phase, solely in terms of trial counsel's failure to present

evidence relating to Petitioner's substance abuse problems. The pleadings detailed the type of testimony which counsel should have presented and provided this Court with affidavits on this issue. The state court which did address the ineffective assistance claim at the penalty phase considered this claim solely in terms of Petitioner's allegations that trial counsel was ineffective for failure to present evidence relating to Petitioner's alcohol dependency. *Lambrix v. State*, 534 So. 2d 1151, 1153 (Fla. 1988). On August 12, 1991, for the first time, three years after the inception of these proceedings, Petitioner attempted to attach new facts to this ineffective assistance claim. At the evidentiary hearing, Petitioner attempted to put on evidence that Petitioner was physically and sexually abused as a child, and was subject to neglect. Petitioner contends that this mitigating evidence existed at the time of the trial, and that trial counsel was ineffective by failing to discover and utilize it at the penalty phase. As expected, the Respondent objected to this testimony as it was never set forth in any pleading and is not part of any claim before this Court. Petitioner strenuously and repeatedly urged this Court to find that the physical and sexual abuse which Petitioner allegedly suffered as a child is intertwined with Petitioner's own alcohol dependency, and with his family history of alcoholism. Petitioner also asserted that claim II was phrased in a generous fashion which would permit evidence of other "mitigating circumstances" to be presented at any evidentiary hearing.

First, this Court wishes to note that it has taken no position with respect to the issue of whether alcoholism and child abuse are interrelated as a social, medical or

psychological phenomenon. The fact that medical, psychological or sociological evidence exists demonstrating this fact does not mean that Petitioner can omit these facts from his petition and expect the state and federal courts reviewing this matter to consider them. These are not facts which the Respondent or the Court or the state court would have gleaned from the petition, its attached affidavits or its amendment. We believe that these additional facts regarding the physical and sexual abuse and neglect which Petitioner suffered as a child materially and significantly alter the nature of the claim, and cannot be presented for the first time before this Court. *Byrd v. Delo*, 942 F.2d 1226 (8th Cir. 1991). ("The fact is that petitioner has never attempted to present this new evidence to a state court. Our conclusion [is] . . . that this claim is procedurally defaulted . . . ") *Bland v. State of Oregon*, 940 F.2d 667 (9th Cir. 1991) ("A prisoner must set forth the facts supporting each ground for a writ of habeas corpus in the petition); *Balfour v. Haws*, 892 F.2d 556, 563 (7th Cir. 1989) (alleging several errors in counsel's performance does not "solicit meaningful review of all potential errors"); *Rodriguez v. McKaskle*, 724 F.2d 463, 466 (5th Cir. 1984), *cert. denied*, 469 U.S. 1039 (1984) (petition dismissed because the "essential facts on which the claim of ineffective counsel rests have not been presented to the state court."); *Brown v. Estelle*, 701 F.2d 494, 495 (5th Cir. 1983) (exhaustion requirement not satisfied if petitioner presents new legal theories or entirely new factual claims to federal court ("Where a federal habeas petitioner presents newly discovered evidence or other evidence not before the state courts such as to place the case

in a significantly different and stronger evidentiary posture than it was when the state courts considered it, the state courts must be given an opportunity to consider the evidence.") *Stevens v. Zant*, 580 F. Supp. 322, 325-326 (S.D. Ga. 1984), *cert. denied*, 475 U.S. 1031 (1986) ("present claim of ineffective assistance of counsel is 'materially broader than [ ] one [ ] originally presented' to the state courts.") (quoting *Domaingue v. Butterworth*, 641 F.2d 8, 12 (1st Cir. 1981)). Thus, we will only view claim II of the petition as asserting that trial counsel failed to investigate and present mitigating evidence of Petitioner's substance abuse problem at the capital sentencing phase of Petitioner's trial.

The penalty phase of a capital sentencing proceeding must be "individualized" and must "focus[ ] on the particularized characteristics of the individual." *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987). The requirement of individualized sentencing in a capital case is satisfied when the jury is permitted to consider all relevant mitigating circumstances. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). In order to make such an individualized presentation, defense counsel must present the jury with the "particularized characteristics" of the Petitioner. *Armstrong*, 833 F.2d at 1433. It is well-established that "[a] criminal defense attorney has a duty to investigate but this duty is limited to reasonable investigation," *Id.* and "under certain circumstances, trial counsel's decision not to investigate family childhood background may legitimately be the product of a reasoned tactical choice." *Francis v. Dugger*, 908 F.2d 696, 703 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1696 (1991). Counsel must have adequately prepared for the penalty phase, and this includes

witness preparation. *See Cunningham v. Zant*, 928 F.2d 1006, 1017 (11th Cir. 1991) (trial counsel ineffective at penalty phase due to minimal preparation, failure to elicit mitigating information from witnesses, and failure to present mitigating evidence, such as evidence of mental retardation, head injuries or socioeconomic background). However, when there is nothing to put trial counsel on notice that a potential mitigating factor necessitates further investigation, counsel does not have the duty to investigate such a factor. *Funchess v. Wainwright*, 772 F.2d 683, 689 (11th Cir. 1985), *cert. denied*, 475 U.S. 1031 (1986) (no duty to investigate where defendant never told counsel of past psychological problems, and psychological evaluation and defendant's actions indicated mental competency). Furthermore, there is no duty to present mitigating evidence if after a reasonable investigation, the attorney determines that such evidence may do more harm than good. *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 573 (1989).

An attorney is entitled to rely on information provided by his client when making strategic choices. *Strickland*, 466 U.S. at 691. In this case, it is clear that Petitioner did not provide his attorney with easy access to evidence which might be considered mitigating. The Petitioner did not volunteer information concerning alcohol abuse to his attorney, who only discovered such evidence after diligent inquiry. Faced with such evidence, the attorney also faced the strategic choice: whether or not to use the evidence as a mitigating factor at the penalty phase of the trial.

When making a strategic choice as to whether or not to present evidence, an attorney must weigh the potential

value of such evidence against its potential detrimental effect. Clearly, a history of alcohol abuse which is unrelated to the crime in question has never been especially valuable to a convicted murderer seeking to avoid the death penalty. When defining mitigating factors, which courts should consider at the sentencing phase of a death penalty case, the Florida legislature did not even include a history of alcohol abuse as one of the factors. Fla. Stat. Ann. § 921.141 (West 1985). Even though the abuse of alcohol has been considered a non-statutory mitigating factor by Florida courts, this Court is aware of no case where a history of alcohol abuse has been considered a sufficient mitigating factor to outweigh the aggravating factors involved in a crime, so as to require that a death sentence not be imposed, or once imposed, overturned.

When a court is asked to engage in the type of second-guessing that the Petitioner requests, it is important to view the attorney's decision in the context of the case as a whole. While at first blush an alleged failure to present the court with the "mitigating circumstance" of alcohol abuse at the penalty phase of a trial might seem impressive, when one considers the minimal weight given such evidence, the attorney's decision is understandable. To the extent that such a decision is based on the potential detrimental effect of such evidence, the tactical decision to not present the evidence is not only understandable, but may have been required under the circumstances. In either case, the decision not to present evidence of which the attorney is aware is tactical in nature, and therefore unchallengeable.

In *Smith v. Dugger,* 840 F.2d 787 (11th Cir. 1988), the court recognized the province of the defense attorney to

make tactical decisions regarding the presentation of evidence. That case, like the present one, involved a convicted felon who challenged his death sentence, arguing that his attorney was ineffective for failing to present evidence of, among other things, the petitioner's history of drug and alcohol abuse and his difficult family background. The court denied petitioner's claims, stating:

> When a claim of ineffectiveness is based on an attorney's failure to present evidence of mitigating circumstances, this court has rejected the argument that such a failure constitutes ineffective assistance per se. Recognizing that some so-called 'mitigating' evidence can actually have a negative impact upon the jury, the court has held that 'the posture of a given case may well justify, if not require, an effective attorney to refrain from presenting such evidence.' (citations omitted). Thus, while an attorney is required to conduct a 'reasonable investigation' into possible mitigating evidence, (citations omitted), counsel may limit presentation of such evidence in the exercise of his reasonable strategic judgment. (citation omitted). A tactical decision not to present mitigating evidence enjoys 'a strong presumption of correctness which is virtually unchallengeable.' (citations omitted).

It is undisputed in this case that after reasonable investigation, Petitioner's attorneys knew of his history of alcohol abuse, but did not present this information to the jury at the penalty phase. This decision not to present evidence amounts to a tactical decision made by counsel in the heat of trial. The reasons for this decision are apparent in the record. First, the attorneys became aware

of Petitioner's alcohol abuse from the psychological evaluation of Dr. Whitman, who also concluded that Petitioner exhibited anti-social behavior and was a mean person. The attorneys testified that they were unwilling to use the testimony of Dr. Whitman because of the detrimental effect his testimony would have at the penalty phase. In short, the Petitioner concluded that testimony of Petitioner's history of alcohol abuse, as well as his history of anti-social behavior, would not be helpful in preventing the imposition of death penalty. It is fundamentally reasonable for the Petitioner's attorneys to have avoided presenting any of this evidence for fear of directing the jury's attention to the dangerous flaws in Petitioner's character.

Instead, at the penalty phase the attorneys chose to concentrate on the fact that this murder was, if anything, an isolated aberration in Petitioner's history. The attorneys called five witnesses at the penalty phase, each of whom testified as to the Petitioner's good character. Evidence of his alcohol abuse would have run contrary to this portrayal. Petitioner's attorneys made an obvious tactical decision in not presenting such evidence. The Petitioner fails to prove that his attorneys' decisions not to present evidence were anything but strategic, and Petitioner certainly fails to prove that said decisions were the result of ineffectiveness.

The Petitioner seems to assert that the trial attorneys' failure to discover the breadth and depth of Petitioner's alcohol abuse problem is further indicia of ineffectiveness. First, it is unclear from the record exactly what the trial attorneys discovered about Petitioner's alcohol abuse history, except that they knew of this history, and

did not attempt to assert it at the penalty phase. As previously stated, such is a tactical decision well within the province of the trial attorneys, which this Court will not second-guess.

The only other fact about Petitioner's history of alcoholism that his trial attorneys could have considered is that several family members suffered from the same problem. First, to the extent that the trial attorneys may have known of this fact, their decision not to present it is tactical in nature, and one which the Court will not second-guess. Second, to the extent that the trial attorneys failed to direct their resources to discovering this fact, this Court finds that they conducted a reasonable investigation, and discovered the more compelling evidence of Petitioner's own history of alcohol abuse. Because they chose not to present any evidence of Petitioner's own history of alcohol abuse, there is no reason to assume that his attorneys would have chosen to present evidence of a family history of alcohol abuse. Furthermore, any failure to direct their resources into discovering a family history of alcohol abuse results from a tactical decision, which this Court will not second-guess.

In summary, if the Petitioner partly bases his ineffective assistance claim upon the fact that his trial attorneys failed to adequately inquire into his family history of alcohol abuse, Petitioner has failed to establish this fact. This Court remains unclear as to exactly what his trial attorneys knew of Petitioner's history of alcoholism, and the Court refuses to speculate, based on the evidence presented, that the trial attorneys failed to discover important evidence. Instead, this Court finds that the trial

attorneys conducted a reasonable investigation, and their decision to present or to not present evidence is tactical in nature, and therefore beyond the scope of this Court's review.

It is true that at his deposition, Robert R. Jacobs II, the trial attorney primarily responsible for the penalty phase, testified on several occasions that he considered facts relating to Petitioner's history with alcohol to be important. However, just because a trial attorney considers such evidence important, he is not required to present it at the penalty phase. It is obvious that the trial attorneys thought such evidence most relevant at the guilt phase, because they attempted to introduce it at the guilt phase. They made a tactical decision not to present such evidence at the penalty phase, and this Court will not inquire into that decision.

The Court's holding in this respect is supported by the testimony of Robert R. Jacobs II, who stated at his deposition that if he had a chance to retry the case he would not have done anything differently. In essence, he refuses to second-guess himself for his decision not to present evidence of Petitioner's alcohol abuse. Neither will the Court engage in any second-guessing. The decision as to whether to present evidence lies with the trial attorney and is not a judgment that can or should be made by this Court in retrospect.

The law provides that counsel will not be regarded constitutionally deficient merely because of tactical decisions. That an attorney's strategy may appear wrong in retrospect does not automatically indicate constitutional ineffective representation. *Ford v. Strickland*, 676 F.2d 434

(11th Cir. 1982); *Williams v. Wainright*, 681 F.2d 732 (11th Cir. 1982); *Sanchez v. U.S.*, 782 F.2d 928 (11th Cir. 1986). The *Sanchez* case goes on to say that when a lawyer makes an informed choice between alternatives as a matter of tactical judgment, he will almost never be overturned on habeas corpus.

Further, it is this "second-guessing" which strains the judicial system with respect to habeas corpus review. It is clear to this Court that had such substance abuse evidence been presented at the penalty phase, the Defendant would then claim that counsel was ineffective *for having presented* the substance abuse evidence.

As noted above, this Court finds that the Petitioner has failed to establish ineffectiveness on the part of counsel at the penalty phase. However, in an abundance of caution and assuming *arguendo* that a reviewing court would find ineffective assistance of counsel at the penalty phase, this Court has still considered the second prong of the *Strickland* test.

The second prong of the *Strickland* test has not been satisfied by the Petitioner. "A defendant challenging a death sentence must show that without the error there is a reasonable probability that 'the balance of aggravating and mitigating circumstances did not warrant death.' " *King v. Strickland*, 748 F.2d at 1463. Where, as here, numerous aggravating circumstances were found, it is far more difficult for Petitioner to prove that the mitigating evidence he wishes to present would outweigh all of the aggravating circumstances.

Florida is a "weighing state" and the death penalty can be imposed only where aggravating circumstances

are proved beyond a reasonable doubt, and these aggravating circumstances outweigh all mitigating circumstances. Fla. Stat. Ann. § 921.141(3) (West 1985); *Parker v. Dugger*, 111 S. Ct. 731, 738 (1991). We do not believe that the mitigating evidence was compelling enough to create a "reasonable probability" that a life sentence would be imposed. Assuming arguendo ineffective assistance, in light of the fact that five aggravating circumstances were found, several of which could not be rebutted by this type of mitigating evidence, we find that any such deficient conduct did not undermine the reliability of the outcome of the sentencing proceeding and Petitioner has demonstrated no prejudice, thus this claim must fail. *See Thompson v. Wainwright*, 787 F.2d 1447, 1456 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987) ("the overwhelming evidence of aggravating circumstances convinces us that there is not a reasonable probability that the jury would have changed its sentencing conclusion had Solomon presented . . . the mitigating evidence"); *Tafero v. Wainwright*, 796 F.2d 1314, 1320 (11th Cir. 1986), *cert. denied*, 483 U.S. 1033 (1987) (where mitigating evidence is weak and aggravating circumstances are overwhelming, no reasonable probability exists that jury would have imposed life sentence); *see also Tafero v. Dugger*, 873 F.2d 249, 252 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1834 (1990).

C. Ineffective Assistance Of Appellate Counsel

Petitioner contends that appellate counsel's performance was deficient in many respects, including but not limited to the failure to challenge the death sentence on

appeal, failure to challenge the trial court's denial of the motion for change of venue, failure to challenge Petitioner's absence from the proceedings, failure to challenge the denial of the voluntary intoxication instruction, and the failure to challenge any sentencing issues. Petitioner further asserts that but for counsel's deficient performance, his conviction would have been reversed on appeal.

We have applied the standards regarding the ineffective assistance of counsel set forth previously herein to this claim, and we note at the outset that this claim must fail as Petitioner is unable to demonstrate prejudice. Petitioner has not been prejudiced for two reasons: (1) appellate counsel's failure to raise these claims did not result in the imposition of a procedural bar by the state courts; and (2) appellate counsel's failure to raise all of these claims did not result in this Court's refusal to address each and every one of these claims on the merits. Petitioner raised each one of these claims in both his 3.850 motion before the state courts and in the instant habeas corpus petition. The Circuit Court did not allow appellate counsel's conduct to prevent it from reviewing and denying the claims on the merits. Also, the Florida Supreme Court's opinion did not rely upon any failure on the part of appellate counsel. *See Lambrix v. Dugger*, 529 So. 2d 1110 (Fla. 1988). Also, it is worth noting that on direct appeal, the Florida Supreme Court did address the imposition of the death sentence and appeared to have reviewed the aggravating circumstances, the lack of mitigating circumstances, and affirmed the sentence. *Lambrix v. State*, 494 So. 2d 1143 (Fla. 1986).

In addition, Petitioner is not prejudiced because this Court has held that these claims are not procedurally barred and is addressing them on the merits. *But cf. Scott v. Dugger*, 686 F. Supp. 1488, 1507, n.2 (S.D. Fla. 1988), *aff'd*, 891 F.2d 800 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 224 (1990) (the possibility exists that in federal habeas, a defendant can never be prejudiced by ineffective appellate counsel because the prejudice is "cured" by the federal court's consideration of the merits of the claims).

V. RIGHT TO TESTIFY

Petitioner states that trial counsel failed to advise Petitioner that he was the final decision-maker with respect to the decision to take the stand and testify, thus any waiver was invalid. Correspondingly, the court did nothing to ensure that the waiver was valid.

On February 27, 1984, the State rested its case and prior to the luncheon recess, defense counsel requested a lengthier recess so that the defense could "possibly get some witnesses or possibly rest [them]selves." (Tr., Vol. 14, p. 2460). After the extended luncheon recess, the State rested its case and the judge denied all motions for judgments of acquittal made by defense counsel. At this time, the defense announced that it rested. (Tr., Vol. 14, p. 2464).

Petitioner presented absolutely no evidence that he was precluded from taking the stand in his own defense. Although he told "his version" of the events of February 3, 1983 to both Drs. Phillips and Stock, he neither presented this in the form of evidence (as opposed to representations by his counsel) nor did he present anything

indicating that he planned to tell this story to the jury, but was prevented from doing so. We wish to note at this point that as far as this Court is concerned, this version of events never surfaced anywhere until 1991, immediately prior to the evidentiary hearing held before this Court. In our review of the exhibits, we noticed a letter dated 1986 from Petitioner to appellate counsel detailing this version of events. (Pet.'s Ex. 35). As far as this Court can tell, Petitioner never told this version of events to either Drs. Macaluso or Whitman. In fact, Petitioner told Dr. Whitman an entirely different version of events on September 3, 1983. (Pet.'s Ex. 29). This claim is without merit.

VI. VICTIM IMPACT EVIDENCE

Petitioner contends that the presentence investigation report which was reviewed by the trial judge at the sentencing phase, contained statements from family members of the victims recommending that Petitioner be sentenced to death. Petitioner contends that the inclusion of these statements in the presentence investigation report violated the principles set forth in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989). First, the Supreme Court recently overruled both *Booth* and *Gathers* by holding in *Payne v. Tennessee*, 111 S.Ct. 2597 (1991) that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . . " The Court also noted that the "*Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty." The Court did state that "[i]n the event that evidence is introduced that is so unduly prejudicial that it

renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.*

In any event, the trial judge and not the jury received and reviewed this material, and the trial judge did not rely upon this information in his findings. (Tr., Vol. 16, p. 2700). Also, we must presume that a trial judge as opposed to the trial jury contemplated in the *Booth* decision would not be "distracted from its constitutionally required task [of] determining whether the death penalty is appropriate . . . " by any consideration of victim impact statements. *Booth,* 482 U.S. at 507. We also do not subscribe to Petitioner's recently submitted theory that *Payne* only addresses factual-type victim impact statements and that the *Booth* and *Gathers* decisions still disallow opinion-type victim impact evidence, i.e., statements by others that the defendant should receive a sentence of death. In *Payne,* the Court focused upon the relevancy of victim impact evidence as a tool to inform the sentencing jury as to the "specific harm caused by the crime in question" so that the jury can "assess meaningfully the defendant's moral culpability and blameworthiness . . . " *Payne v. Tennessee,* 115 L. Ed. 2d at 725. Although a statement by the parent of the victim that a criminal defendant should receive a death sentence is less relevant than the type of evidence considered by the *Payne* Court, we do not feel that according to the rationale of the *Payne* decision, that it lacks all relevancy. It does bears [sic] a potential for prejudice but in the instant case, such potential was not realized. The record does not reflect any consideration of this type of evidence by the jury, and we do not believe its consideration by the judge rendered

Petitioner's entire sentencing proceeding fundamentally unfair. *See Payne,* 111 S. Ct. 2597.

VII. SENTENCING JURY IMPROPERLY INSTRUCTED

Petitioner alleges that the instructions given at the sentencing phase instructed the jury that they were to consider the "extensive evidence regarding [Petitioner's] character and background" as an aggravating rather than a mitigating circumstance. (DE 1). The transcript of the instructions referenced reads in pertinent part:

> Among the mitigating circumstances that you may consider, if established by the evidence, are: . . .
>
> The age of the Defendant at the time of the crime and any other aspect of the Defendant's character or record and any other circumstance of the offense, each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established . . . (Tr., Vol. 15, p. 2664).

It appears to this Court that this transcription is grammatically incorrect. Perhaps, the phrase which begins "each aggravating circumstance" should have been a new sentence or paragraph. But the instructions themselves are legally correct. Also, the jury could discern from the introductory paragraph that the Court was discussing mitigating circumstances. In any event, the jury was specifically told at an earlier point in the jury instructions which circumstances they could consider as aggravating, and they were instructed that this list of

aggravating circumstances was exclusive. (Tr., Vol. 15, p. 2662). Therefore, we presume that the jury followed the court's instructions, and did not consider these mitigating factors as aggravating circumstances. In addition, both counsel referenced these items as mitigating evidence in their closing arguments thereby eliminating any potential for confusion. This claim does not provide Petitioner with any grounds for relief.

VIII. REFUSAL TO GIVE VOLUNTARY INTOXICATION INSTRUCTION

Petitioner claims that the evidence of intoxication was ample and that the trial judge's refusal to give Petitioner's requested jury instruction on voluntary intoxication denied him his "fundamental rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments." (DE 1). Petitioner also asserts that if properly instructed, the jury would have convicted Petitioner of second degree murder, thus the refusal by the trial judge to give this instruction violated the principles set forth in *Beck v. Alabama*, 447 U.S. 625 (1980). *Beck* provides that a death sentence may not be imposed where the jury was not permitted to consider a verdict of guilt on a lesser-included, non-capital offense.

At Petitioner's first and second trial, the trial judges both refused to give a voluntary intoxication instruction because there was no testimony that Petitioner was intoxicated on the night in question, although there was evidence that he was drinking alcoholic beverages in a bar. The trial judge in the second trial stated:

> There has not been any testimony that he was drunk other than at the time they were going back to Hillsborough County. But there was no testimony that I have hear (sic) as to the night of the alleged offense other than they were drinking. And the only one that I heard mention anything about anybody being drunk was Lamberson, not the Defendant. (Tr., Vol. 14, p. 2470).

In this case, the Florida Supreme Court, in interpreting its own state law held that "a jury instruction on the defense of voluntary intoxication need not be given simply because there is evidence that the defendant consumed alcoholic beverages prior to the commission of the offense. . . . If the evidence shows the use of intoxicants but does not show intoxication, the instruction is not required." *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988). Because the Florida Supreme Court was considering this claim in light of the ineffective assistance of counsel claim, it did not explicitly state that the evidence adduced at trial was insufficient to require that a voluntary intoxication instruction be given. However, this finding is implicitly made within the opinion. *See Id.* at 1154. In fact, Petitioner himself, in the instant petition, states that his trial counsel failed to introduce the necessary evidence so that he might avail himself of this defense. (DE 1, p. 29).

Petitioner has raised an issue "invol[ving] a pure question of state law" and issues of state law do not generally raise issues of constitutional magnitude. *Carrizales v. Wainwright*, 699 F.2d 1053, 1054 (11th Cir. 1983). "A defective jury charge raises an issue of constitutional dimension only if it renders the entire trial fundamentally unfair." *Id.* at 1055; *Jones v. Dugger*, 888 F.2d 1340, 1343

(11th Cir. 1989). In light of the evidence which was presented at trial with respect to Petitioner's "intoxication" on the night in question, the trial judge neither erred nor rendered the entire trial "fundamentally unfair" by his refusal to give the requested jury instruction on voluntary intoxication.

IX. TRIAL JUDGE FORCED MISTRIAL

Petitioner contends that the trial judge rushed the jury through their deliberations by threatening to sequester them if they did not reach a verdict that first evening of their deliberations. He also asserts that the trial judge refused to accommodate certain jurors' needs for food and medication.

Our review of the transcript of this portion of the first trial does not support Petitioner's contentions as to this point and in any event Petitioner is not entitled to relief on this claim.

X. OVERBROAD APPLICATION OF AGGRAVATING CIRCUMSTANCES

Petitioner asserts that the jury instructions regarding the "especially heinous, atrocious or cruel" and the "cold, calculated and premeditated" aggravating circumstances have been interpreted by the Florida Supreme Court in an unconstitutionally overbroad fashion in violation of the principles set forth in *Maynard v. Cartwright*, 486 U.S. 356 (1988).

As a threshold matter, this Court must determine whether the principles set forth in *Maynard v. Cartwright*

are to be given retroactive application. The retroactivity analysis is governed by the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), and such analysis is applicable to capital cases. *Penry v. Lynaugh*, 492 U.S. 302 (1989). Under *Teague*'s retroactivity analysis, a court must determine in the first instance whether the relief a habeas petitioner seeks is based upon a "new rule." *Teague v. Lane*, 489 U.S. at 300. A "new rule" is announced when the holding of a case breaks new ground or imposes a new obligation upon either state or federal government. *Id.* A case announces a "new rule" if the result was not dictated by precedent existing at the time the petitioner's conviction became final. *Teague*, 489 U.S. at 301; *Davis v. Maynard*, 911 F.2d 415, 417 (10th Cir. 1990). A conviction is final when the availability of a direct appeal from a judgment has expired and the time for filing a petition for certiorari has elapsed. *Allen v. Hardy*, 478 U.S. 255, 258, n.1 (1986).

According to *Teague*, a "new rule" announced by case law will not be applied on collateral review except in two circumstances: (1) where the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' " or (2) where the new rule "requires the observance of 'those procedures that are implicit in the concept of ordered liberty.' " *Teague*, 489 U.S. at 307. The *Teague* analysis is an attempt to preserve principles of comity by upholding a state court's reasonable, good-faith interpretation of existing precedent although such precedents are later overruled. *Butler v. McKellar*, 494 U.S. 407 (1990); *Davis v. Maynard*, 911 F.2d at 417. This inquiry requires us

to "determine whether a state court considering [Petitioner]'s claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [Petitioner] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484 (1990).

Other courts have held that challenges to the "heinous, atrocious or cruel" or "cold, calculated, and premeditated" aggravating circumstances instructions do not call for the creation of a "new rule." *Davis v. Maynard*, 911 F.2d at 418 (challenge to "heinous, atrocious or cruel" instruction did not call for creation of new rule under *Teague* and *Penry*). Therefore, we proceed to consider the substance of these claims.

It is well-established that "aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." *Lewis v. Jeffers*, 497 U.S. ___, 110 S.Ct. 3092, 111 L. Ed. 2d 606, 619 (1990). In this Circuit the "heinous, atrocious or cruel" aggravating circumstance withstands Eighth amendment challenge provided that it satisfies the following three part test: (1) the appellate courts of the state must have narrowed the meaning of the words "heinous, atrocious or cruel" by consistently limiting their application to a relatively narrow class of cases, so that the sentencer is informed of what it must find in order to impose the death penalty; (2) the sentencing court must have made either an express finding that the crime was "heinous, atrocious or cruel" or a finding that the narrowing characteristics defining the terms existed in this case; and (3) the sentencer's decision that this crime was "especially heinous,

atrocious or cruel" must not subvert the "narrowing function of those words by obscuring the boundaries of the class of cases to which they apply." *Lindsey v. Thigpen*, 875 F.2d 1509, 1514 (11th Cir. 1989). As for the first requirement, the Florida courts have properly narrowed the construction of these two aggravating factors. *See Proffitt v. Florida*, 428 U.S. 242 (1976). Florida courts have interpreted the "heinous, atrocious or cruel" instruction to require that the crime be one which is a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Henderson v. Dugger*, 925 F.2d 1309, 1317 (11th Cir. 1991); *Proffitt v. Florida*, 428 U.S. at 255. The "cold, calculated and premeditated" instruction requires that an additional level of premeditation be shown than that required to obtain a first degree murder conviction. *Henderson*, 925 F.2d at 1317.

In Florida, the jury renders an advisory verdict regarding the appropriate penalty and the trial judge imposes the actual sentence. Fla. Stat. Ann. § 921.141(2)-(3) (West 1985). If the trial judge does impose a sentence of death, findings in support of the death sentence must be entered in writing specifying the sufficiency of the existing aggravating factors and the extent to which the aggravating factors outweigh the mitigating factors. Fla. Stat Ann. § 921.141(3). Therefore, the jury acting in its advisory capacity does not have to specify either the aggravating circumstances or the mitigating circumstances which they have found. *Walton v. Arizona*, 110 S. Ct. 3047, 111 L. Ed. 2d 511, 524 (1990) (" 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be

made by the jury.' ") (quoting *Hildwin v. Florida*, 490 U.S. 638 (1989)).

In the instant case, the record reveals that the jury was instructed that two of the aggravating circumstances which they could consider were whether or not the "crime for which the Defendant is to be sentenced was especially wicked, atrocious, or cruel." (Tr., Vol. 15, p. 2663), and that the "crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (Tr., Vol. 15, p. 2663). The only other instruction pertaining to either of these aggravating circumstances was given subsequently when the trial judge stated to the jury: "If the evidence shows beyond a reasonable doubt that the death was caused by one or more numerous wounds to the decedent, you may be justified in finding that the killing was especially heinous, atrocious or cruel." (Tr., Vol. 15, p. 2668). However, under the capital sentencing scheme in Florida, we are not sure as to which aggravating factors the jury found. The trial judge found that the capital felonies were especially heinous and atrocious because "[t]he facts speak for themselves." (Tr., Vol. 8, p. 1355). With respect to the "cold, calculated and premeditated" instruction, the trial judge found that the crimes were committed in this manner because:

> Defendant had not one harsh word with either of the victims and, in fact, had not known them before that night. He enticed Mr. Moore out to himself and beat him to death with a tire iron. He then enticed Miss Bryant out and strangled her to death. He then left her head in a puddle

> of water so that on the off chance she was still alive she would drown. He then went back in to the trailer, washed up and ate a plate of spaghetti. (Tr., Vol. 16, p. 2701-2702).

We note at this point that Petitioner's claim that the trial judge based his finding upon post-offense conduct even if error, is unfounded as the judge recited several other facts which led him to conclude that the crimes were "cold, calculated and premeditated." The sentencing trial judge, who found the particular aggravating circumstances to be applicable, is presumed to know and apply the law and its narrow construction. *See Walton v. Arizona*, 111 L. Ed. 2d at 528. Additionally, the Florida Supreme Court reviewed, considered and affirmed the application of each of the aggravating circumstances in this case. *Lambrix v. State*, 494 So. 2d 1143, 1148 (Fla. 1986).

Also, Petitioner contends that even if properly construed, these instructions were inapplicable to the instant case. The Supreme Court has commented:

> Where the issue is solely whether a state court has properly found the existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts to 'peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably – perhaps even quite plainly – fit within the statutory language.' "

Lewis v. Jeffers, 111 L. Ed. 2d at 623 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 458 (1980)).

The *Jeffers* Court noted that federal habeas relief does not exist when the claim "reduces in essence, to a claim

that the state court simply misapplied its own aggravating circumstance to the facts of his case." *Id.* at 622. Our federal habeas review of a "state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricous [sic] as to constitute an independent due process or Eighth Amendment violation." *Id.* The standard which is applied to determine whether the application of this aggravating circumstance to the instant offense could have caused a due process or Eighth Amendment violation is that of the "rational factfinder." *Id.* Our inquiry is whether or not a rational factfinder could find that the aggravating circumstance, as defined by its constitutionally narrowing criteria, applies to the facts of the instant case. *Id.* at 624-625.

Upon application of this standard to the trial judge's finding that the offenses were both "heinous, atrocious or cruel," and "cold, calculated and premeditated," we are constrained to hold that these are findings "that a rational factfinder could have made." *Id.* at 625.

X. THE CALDWELL CLAIM

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Supreme Court concluded that it was constitutionally impermissible for a jury in a capital case to be "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-329. The decision in *Caldwell* teaches us that it is improper for any party to lead the jury to believe that their decision with respect to any sentence of death is not "final" because the decision will be subjected to further

review. *Id.* at 336. Certain types of comments made during the proceedings, specifically, "those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision, are prohibited. *Dugger v. Adams*, 489 U.S. 401, 407 (1989) (citing *Darden v. Wainwright*, 477 U.S. 168, 184, n.15 (1986). Here, Petitioner asserts that the prosecutor made comments both at sentencing and during jury selection which are impermissible pursuant to *Caldwell*.

As a threshold matter, recent decisions of the United States Supreme Court have held that *Caldwell* claims are not available in certain instances depending upon when a petitioner's conviction has become final, and whether or not trial counsel raised an objection to the allegedly improper comments or instructions at the time they were heard by the jury. *Sawyer v. Smith*, 110 S. Ct. 2822, 2814 (1990); *Dugger v. Adams*, 489 U.S. at 407 (1989). A Petitioner whose conviction became final before the United States Supreme Court announced its decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is not entitled to use the *Caldwell* decision to challenge his capital sentence in a federal habeas corpus action. *Sawyer v. Smith*, 110 S. Ct. at 2824. In *Sawyer*, the Court explained that its prior decision in *Caldwell* announced a "new rule" as such has been defined in *Teague v. Lane*, 489 U.S. 288 (1989), and the "new rule" did "not come within *Teague*'s exception for watershed rules fundamental to the integrity of the criminal proceeding." *Sawyer*, 110 S. Ct. at 2825.

In the instant case, Petitioner's conviction became final when the Florida Supreme Court denied Petitioner's appeal of his 3.850 motion and his Emergency Motion To

Stay Execution, which was well after the Supreme Court's decision in *Caldwell*. *Lambrix v. State*, 529 So. 2d 1151 (Fla. 1988). Therefore, Petitioner has satisfied this requirement. The second requirement as set forth in *Dugger v. Adams*, 489 U.S. 401, applies only where a procedural bar has been applied at the state court level to the *Caldwell* claim. In *Dugger*, the Supreme Court held that where the state courts have found that a petitioner's *Caldwell* claim is procedurally barred due to failure to object at trial, and failure to challenge them on appeal, the *Caldwell* decision does not constitute cause to excuse the procedural default. For the reasons set forth in Section I above, none of the claims raised by Petitioner in his 3.850 motion are procedurally barred, thus this requirement is inapplicable.

Although the Florida courts have held that the decision in *Caldwell v. Mississippi*, is inapplicable to Florida's sentencing scheme, this Circuit has applied principles from the *Caldwell* decision to cases arising out of the Florida sentencing scheme, and we are not constrained to follow state courts with respect to this federal claim. *See Combs v. State*, 525 So. 2d 853 (Fla. 1988); *Mann v. Dugger*, 844 F.2d 1446, 1455 (11th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989). Our review of *Caldwell* claims consists of two steps: (1) did either a prosecutor's comments or a judge's instructions "minimize the jury's sense of responsibility for determining the appropriateness of death" as a penalty, *Mann*, 844 F.2d at 1456 (quoting *Caldwell v. Mississippi*, 472 U.S. at 341), and (2) if so, did the trial judge "sufficiently correct[ ] the impression left by the prosecutor." *Id.* at 1456 (quoting *McCorquodale v. Kemp*, 829 F.2d 1035, 1037 (11th Cir. 1987)). The rationale behind the

inquiry is that if such misleading statements are made to the sentencing jury, and left uncorrected, the court has implicitly given the "state's imprimatur to those comments [ ] [and] the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a correct statement of the law." *Id.* at 1457.

Most importantly, an assumption critical to any *Caldwell* violation is that the purportedly defective instruction or comment did in fact misstate the prevailing state law. If the challenged instruction or comments accurately reflect the role of the jury under state law, then the *Caldwell* claim lacks basis. *Dugger v. Adams*, 489 U.S. at 407.

In Florida, the role of the sentencing jury is advisory. *Harich v. Dugger*, 844 F.2d 1464, 1473 (11th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989); Fla. Stat. Ann. § 921.141(3) (West 1985). Therefore statements to this effect are not misleading. *Harich*, 844 F.2d at 1473-1474. Comments which "accurately explain the respective functions of the judge and jury are permissible under *Caldwell*" provided that the importance of the jury's recommendation is adequately emphasized. *Id.* at 1475. "It is vital that the advisory jury fully understand the gravity of its sentencing decision." *Id.* at 1473.

In our review of the entire trial transcript we have uncovered the following comments which have some bearing upon the *Caldwell* claim in the petition. During jury selection the prosecutor told a member of the venire panel, Mrs. Pace that:

> MR. GREENE: If you are picked as a juror, Mrs. Pace – I'm sure it will come to the end of the trial, and Judge Stanley – as he gives the instructions before the deliberation that the possible sentencing in this case is such and such, but I believe, he will also tell you right afterwards – having told you that you are to disregard his previous instructions, and that is the Court's decision and exclusive province to impose any possible sentence in a case – it's not the jury's job to impose a sentence. You give a possible recommendation in a case like this, but it's all this is. It's a recommendation. Do you understand? (Tr., Vol. 10, p. 1672).

At another point in the jury selection process, the prosecutor told venire panel member Mr. Bowers:

> MR. GREENE: It's important that you realize that it is not your job to impose a sentence. You make recommendations, and perhaps later on the Honorable Judge Stanley will impose the actual sentence . . . To let the possibility of inflicting the sentence affect your verdict would be outside your responsibilities.

No objection was lodged by defense counsel to either statement made by the prosecutor, and at an earlier point in the voir dire phase, defense counsel had stated to the venire panel:

> We're not negotiating the fact that your recommendation, if you are called to make one, would have great weight with His Honor, Judge Stanley. Do you understand that? It's very, very important. It's not saying that there is something to take – to be taken lightly. (Tr., Vol. 9, p. 1530).

At the penalty phase of the trial, the trial judge made several references to the division of responsibility for the ultimate imposition of sentence, once at the outset of the sentencing phase:

> THE COURT: . . . Final decision as to what punishment shall be imposed rests solely with me, the judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant. (Tr., Vol. 15, 2569).

A second reference was made by the judge after the following colloquy by defense counsel and the prosecutor:

> MR. JACOBS: . . . The prosecutor has told you what he wants. He wants Gary (sic) dead. This is what he said. But he can't do it alone. There has to be a recommendation from you recommending the death penalty for the judge to consider.
>
> MR. McGRUTHER: Objection, Your Honor. The Court does the actual sentencing.
>
> THE COURT: The Court does the actual sentencing. The jury does not.
>
> MR. JACOBS: That is what we said Judge. You are deciding whether to recommend life or death at this time. And regardless of what Mr. McGruther said – and he is persuasive – regardless of that, yours is not merely just any old advisory opinion. Judge Stanley is looking to you twelve for guidance. He's (sic) told you and he will tell you again that your recommendation will carry great weight as to what his sentence may be. And it will figure substantially into his

> consideration as to what the final outcome and the sentence in this case will be. If you err in this recommendation, you make a mistake, there is no authority on Earth that can bring you back an hour, a day, a week, a month, a year from now, no authority on Earth that can bring you back together again if you err. You must be sure before you sign that advisory opinion today. (Tr., Vol. 15, p. 1654).

The third judicial reference to the jury's responsibility for the imposition of the death sentence occurred when the jury was instructed on the law applicable to the penalty phase:

> THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his two crimes of two counts of first degree murder. That is two separate counts, being two separate crimes. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge . . . (Tr., Vol. 15, p. 2662).

At the conclusion of the jury charge during the penalty phase, the trial judge instructed the jury:

> THE COURT: . . . With regard to the effect of your recommendation of life or death, the Court hereby instructs you that although your recommendation is considered to be advisory, your recommendation of death upon conviction of first degree murder is entitled to a great weight. On the other hand, in order for the Court to impose a sentence of death following a jury recommendation of life the facts suggesting a

> sentence of death must be so clear and convincing that virtually no reasonable person could differ. (Tr., Vol. 15, p. 2670).

According to the principles set forth in the *Caldwell* decision as it has been interpreted in both *Mann* and *Harich*, we believe that neither the prosecutor's comments nor the judge's statements misled the jury, *see Harich*, 844 F.2d at 1473-1474, because they accurately described Florida's capital sentencing procedure. Additionally, even if the jury was somehow led astray by these comments, the judge's final instruction to the jury which emphasized the importance of the jury's recommendation "sufficiently corrected" any improper impressions left by the prosecutor. *Mann*, 844 F.2d at 1456.

XII. REFUSAL TO FIND MITIGATING CIRCUMSTANCES

The trial judge, at Petitioner's sentencing phase, found that no mitigating circumstances and five aggravating circumstances existed. Petitioner argues that the record belies this conclusion.

When discussing the trial judge's findings as to aggravating circumstances, we have stated that when we are reviewing a claim which "reduces in essence, to a claim that the state court simply misapplied its own aggravating circumstance to the facts of his case," our federal habeas review of a "state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricous [sic] as to constitute

an independent due process or Eighth Amendment violation." *Jeffers*, 111 L. Ed. 2d at 622. The Supreme Court has stated that the standard to be applied in determining whether an independent due process or Eighth Amendment violation occurred by the application of this aggravating circumstance to the instant offense is that of the "rational factfinder." *Id.* In *Parker v. Dugger*, 111 S. Ct. 731, 740 (1991), the Court indicated that the same standard governed the inquiry as to whether a trial judge correctly found or refused to find mitigating circumstances. Thus, applying the appropriate standard, this Court believes that a rational factfinder could find that based upon the scant presentation of trial counsel, and the type of testimony elicited at the penalty phase, no mitigating circumstances existed.

XIII. BURDEN OF PROOF UNCONSTITUTIONALLY SHIFTED

Petitioner asserts that the trial judge, in his instructions to the jury at the sentencing phase, unconstitutionally shifted the burden of proof to the Defendant to establish mitigating circumstances when he instructed the jury that:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. (Tr., Vol. 15, p. 2663-2664).

This issue has been addressed several times by the Eleventh Circuit and the validity of this exact jury

instruction has been upheld. *See Henderson v. Dugger*, 925 F.2d at 1318; *Bertolotti v. Dugger*, 883 F.2d at 1524-25.

Additionally, we note that the United States Supreme Court in *Walton v. Arizona*, 110 S. Ct. 3047, 3055 (1990) has held that "a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *But cf. Jackson v. Dugger*, 837 F.2d 1469, 1473 (11th Cir. 1988), *cert. denied*, 486 U.S. 1026 (1988) (instruction that "death is presumed to be the proper sentence" unconstitutional). This claim does not require further discussion.

Petitioner contends that the trial judge and the prosecutor erred when they both told the jury that the vote in order to impose a death sentence need not be unanimous. We find this claim to be without merit warranting no further discussion.

XIV. BRADY CLAIM

Petitioner asserts that material, exculpatory evidence was withheld from the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). According to Petitioner, the star witness Francis Smith had entered into a deal with the Government in exchange for her testimony and this deal was never disclosed to the defense.

This Court is unconvinced that Frances Smith ever received any "deal" from any law enforcement agency with respect to the aiding and abetting charges. We agree with the position set forth by the Respondent in its

Response in Opposition To application For Stay Of Execution, And Response In Opposition To Petition For Writ Of Habeas Corpus (DE 13). Defense counsel was permitted vigorous cross-examination of this witness on this point, and did argue this matter to the jury. Trial counsel did paint Frances Smith as self-interested and untruthful for her own purposes and for this reason we believe that even if there had been a "deal" and this was revealed to the jury, the outcome would remain unchanged. *See Francis v. Dugger*, 908 F.2d at 701.

XV. RESTRICTION OF CROSS-EXAMINATION

Petitioner contends that the trial judge improperly restricted the cross-examination of witness Francis Smith with respect to alleged prior inconsistent statements she made to law enforcement upon her own arrest and that the cross-examination of witness Connie Smith was restricted as well. Petitioner did raise this issue on direct appeal and was denied relief. *See Lambrix v. State*, 494 So. 2d 1143, 1147 (Fla. 1986). It is the opinion of this Court that the Florida Supreme Court's decision with respect to these evidentiary rulings is correct.

XVI. ESCAPE TESTIMONY IMPROPERLY ADMITTED

Petitioner contends that the trial court erred in permitting testimony regarding Petitioner's alleged escape from the Lakeland Community Correctional Center despite the fact that Petitioner was neither charged with nor convicted of an escape. This evidence was used as an

aggravating circumstance and to rebut mitigating evidence at sentencing.

Although Petitioner had not been convicted of the escape charge, he was still officially "serving" a sentence of imprisonment which had been imposed upon him, and that was justifiably considered as an aggravating circumstance. In any event, in light of the number of aggravating circumstances deemed applicable, even if this circumstance was invalidated, the same result would obtain.

XVII. ADDITIONAL UNNUMBERED CLAIMS

Petitioner has raised four additional unnumbered claims in his Amendment (DE 51) to the petition for habeas corpus filed on November 20, 1989: (1) setting aside a prior conviction, (2) an anti-sympathy instruction claim, (3) improper instruction with respect to the weighing of the aggravating and mitigating circumstances, and (4) the court-appointed psychiatrist rendered ineffective assistance to Petitioner.

These claims are procedurally barred because they were neither raised on direct appeal nor within the two-year limit provided for by the rules governing 3.850 motions. According to *Coleman v. Thompson*, 500 U.S. ___, 111 S. Ct. 2546 (1991), where a petitioner fails to exhaust his claims before a state tribunal and the state courts would now find his claims to be procedurally barred, "a procedural default for purposes of federal habeas [is applied] regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id.*

at n.1. In addition, none of these claims contains any grounds upon which we would grant Petitioner relief.

We will briefly comment upon several of the claims although they are procedurally barred but we believe that even if we were to consider the merits of each of these additional unnumbered claims, Petitioner would not be entitled to relief on any of the grounds alleged therein.

With respect to the anti-sympathy instruction, Petitioner alleges that the prosecutor unfairly directed the jury not to consider his evidence of mitigation at sentencing in violation of the Eighth amendment. In the intervening time which has passed since Petitioner filed his amendment to the habeas corpus petition, in *Saffle v. Parks*, 494 U.S. 484 (1990), the Supreme Court decided this issue adversely to Petitioner.

First, it has already been determined that under *Teague v. Lane*, 489 U.S. 288 and *Penry v. Lynaugh*, 492 U.S. 302, the announcement that an "anti-sympathy" jury instruction was unconstitutional, would be a "new rule" as defined by *Teague*. *Saffle*, 494 U.S. at 486. As a "new rule," Petitioner's proposed rule could not be applied on collateral review unless it fit within one of the two exceptions set forth above which permit the retroactive application of a "new rule" (1) when the rule places a class of private conduct beyond the power of the state to proscribe, addresses a "substantive categorical guarante[e] accorded by the Constitution which permit or (2) when the "new rule" implicates "watershed rules of criminal procedure" dealing with the "fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495. As the Supreme Court has already decided that this

"new rule" does not fall within those two exceptions, this rule cannot be applied on collateral review. *Id.*

In any event, the *Saffle* decision rejected the underlying premise upon which Petitioner's claim rests, namely that this type of "anti-sympathy" instruction violates Petitioner's Eighth Amendment rights. *Saffle*, 494 U.S. at 493. ("It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our long-standing recognition that, above all, capital sentencing must be reliable, accurate and nonarbitrary.") Thus, this claim has been rejected both as a non-retroactively applied "new rule," and on the merits.

We find that Petitioner's claim that court-appointed psychiatrist, Dr. William Whitman rendered ineffective psychiatric assistance borders upon frivolous. The testimony of Dr. Robert Phillips and Dr. Whitman, presented at the evidentiary hearing was contrary to Petitioner's claim. Dr. Whitman, in light of the information available to him, rendered quite competent psychiatric assistance to Petitioner. Because we find this claim to be both procedurally barred and without merit, we do not reach the issue also left open by the Eleventh Circuit as to whether or not these types of claims apply retroactively in light of *Teague v. Lane*, 489 U.S. 288 (1989), and *Penry v. Lynaugh*, 492 U.S. 302 (1989). *See Clisby v. Jones*, 907 F.2d 1047, 1049 (11th Cir. 1990).

CONCLUSION

There must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, that the legal issues in the case have been sufficienty [sic] litigated and re-litigated so that the law must be allowed to run its course. If the holdings in numerous cases are to be anything but dead letters, capital punishment when imposed pursuant to the standards laid down in those cases is constitutional; and when the standards expounded in those cases and in subsequent decisions of the United States Supreme Court bearing on those procedures have been complied with, the state is entitled to carry out the death sentence. Indeed, just as the rule of law entitles a criminal defendant to be surrounded with all of the protections which do surround him under our system prior to conviction and during trial and appellate review, the other side of that coin is that when the state has taken all the steps required by that rule of law, its will, as represented by the legislature which authorized the imposition of the death sentence and the state courts which imposed it and upheld it, should be carried out.

The Petitioner has received the process and close scrutiny which he is due. All of the Petitioner's numbered claims have been reviewed on the merits and present no valid basis for granting relief. Petitioner's unnumbered claims are procedurally barred and as to each of the procedurally barred claims, we do not believe that a "colorable showing of innocence" has been made, therefore, the ends of justice do not mandate reconsideration. *See Johnson v. Singletary*, 938 F.2d 1166 (11th Cir. 1991).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. The Emergency Petition For Writ Of Habeas Corpus (DE 1) and its Amendment (DE 51) be and the same are hereby **DENIED**; and

2. The stay of execution hereby imposed by this Court on December 2, 1988 be and the same is hereby **VACATED**, set aside and of no further force and effect.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of May, 1992.

/s/ William J. Zloch
WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

Counsel of Record on
Attached Mailing List

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CARY MICHAEL LAMBRIX,

Appellant,

v. CASE NO. 92-4539

HARRY K. SINGLETARY, Jr.
Secretary, Department of
Corrections,

Appellee.

_____ /

MOTION TO TOLL TIME FOR FILING BRIEF OF APPELLEE ONLY WITH RESPECT TO ISSUE VII (the *"Espinosa"* issue) AND CONCOMITANT MOTION TO HOLD PROCEEDINGS IN ABEYANCE

COMES NOW the appellee, by and through the undersigned Assistant Attorney General, and hereby moves this Honorable Court for its Order tolling the time for the filing of the Brief of the Appellee with respect to Issue VII only, and for a further Order requiring appellant, Cary Michael Lambrix, to exhaust his *"Espinosa"* claim in the state court, and as grounds therefore would show unto the Court as follows:

I.

The Brief of Appellee in the above-styled cause is due for filing on or before March 4, 1993. During the preparation of your appellee's brief, undersigned counsel observed that appellant is presenting to this Court a claim predicated upon the recent United States Supreme

Court decision rendered in *Espinosa v. Florida*, 505 U.S. ___, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992). The *Espinosa* decision was rendered on June 29, 1992, whereas the Final Order of the District Court in the instant case was entered on May 12, 1992 (thereby predating the *Espinosa* decision; R6-141). It is the position of your appellee that the *Espinosa* claim has *not* been exhausted in the Florida state courts, and your appellee does *not* waive exhaustion. See *Thompson v. Wainwright*, 714 F.2d 1495 (11th Cir. 1983).

II.

In his collateral pleadings in the state and federal courts, appellant had presented a claim predicated upon *Maynard v. Cartwright*, 486 U.S. 356 (1988), which attacked the application of the Florida *statute* dealing with the heinous, atrocious, or cruel aggravating factor. A comprehensive examination of the language employed by collateral counsel in this claim reveals that approximately one paragraph has been tucked within the verbiage dealing with the purported vagueness of the jury *instruction* pertaining to the heinous, atrocious, or cruel aggravating circumstance,[1] but in no way can it be said that appellant

[1] The following paragraph was inserted within both the 3.850 motion in state court and the habeas corpus petition in federal court:

> "In Mr. Lambrix's case, as in *Cartwright*, what was relied upon by the jury, judge, and the Florida Supreme Court on direct appeal, did not guide or channel sentencing discretion. No 'limiting construction' was ever applied to the 'heinous, atrocious, or cruel' aggravating circumstance before the jury and the error was not cured by appellate

has *fairly* presented a claim concerning jury *instructions* to the state courts for resolution. In order for a claim presented in a federal habeas corpus proceeding to be considered exhausted, the petitioner must first have afforded the state courts a "fair opportunity" to address the "substance" of it. *See, e.g., Picard v. Connor,* 404 U.S. 270 (1971); *Anderson v. Harless,* 459 U.S. 4 (1982). Further, the United States Supreme Court has recently observed that exhaustion "means more than notice." *Keeney v. Tamayo-Reyes,* ___ U.S. ___, 112 S. Ct. 1715, 1720, 118 L.Ed.2d 318 (1992). There is most assuredly a marked difference in presenting a claim as to the purported vagueness of the Florida

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review of this aggravating factor. Clearly, under the principles of *Cartwright*, the [non] standards attendant to the application of the 'heinous, atrocious, or cruel' aggravating circumstance in this case violate the eighth and fourteenth amendments."

This insertion was set forth as paragraph 5 of a claim in the 3.850 motion (at p. 91) and in the federal habeas petition (at pp. 145-146). However, the claim itself was titled:

> "THE FLORIDA SUPREME COURT HAS INTERPRETED 'ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL' IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF *MAYNARD V. CARTWRIGHT,* 108 S.CT. 1853 (1988), AND THE EIGHTH AND FOURTEENTH AMENDMENTS."

Indeed, an examination of the entirety of the claim itself (as raised in both state and federal court) reveals that appellant's challenge was to the application of the facts of this case to the *statute* and aggravating factor itself, and *not* to the jury instructions.

statute or to the aggravating factor itself as opposed to a claim attacking the purported vagueness of the jury *instruction* as to that aggravating factor. See *Henderson v. Dugger,* 925 F.2d 1309, 1317 (11th Cir. 1991). Inasmuch as appellant has never fairly presented a claim to the state courts, or, indeed, to the federal district court, as to the purported vagueness of the jury *instructions,* appellant should not be permitted to present this claim for the first time in this Honorable Court on appeal.

III

Undersigned counsel is presently engaged in the preparation of the Brief of the Appellee in the instant case and is not seeking to continue or delay the filing of the brief. However, your appellee is requesting this Honorable Court to toll the time for the filing of the appellee's response to appellant's Issue VII only so that appellant, if he desires, can exhaust his state court remedies with respect to a claim which has arisen by virtue of the *Espinosa* decision, a decision which postdates the entry of the Final Order entered by the District Court. Thus, undersigned counsel represents that but for presently unforeseen circumstances the Brief of Appellee will be filed pursuant to the March 4, 1993, date which this Court has established. However, should this Honorable Court grant the instant motion and order appellant to exhaust his state court remedies, the Brief of Appellee will be complete but for the omission of argument in opposition to Issue VII. Argument will be offered in a Supplemental Brief at an appropriate time subsequent to resolution of the *Espinosa* claim by the state courts.

IV.

To the best of undersigned counsel's knowledge, the instant motion is the first request by Florida state officials to hold an Eleventh Circuit Court of Appeals proceeding in abeyance pending resolution of an *Espinosa* claim in state court. However, Florida capital defendants have successfully moved this Court to hold proceedings in abeyance to permit the presentation and resolution of claims in the state courts. See *Marek v. Singletary*, Case No. 90-6083 (presentation of an *Espinosa* claim to the state court); *Kight* [sic] *v. Singletary*, Case No. 92-2935 (presentation of an *Espinosa* claim to the state court); *Mills v. Dugger*, Case No. 883945 (presentation of an *Espinosa* claim to the state court; presentation of a *Booth v. Maryland* claim to the state court); *Quince v. Dugger*, Case No. 89-3048 (presentation of a claim predicated upon newly discovered evidence); *Meeks v. Dugger*, Case No. 87-3281 (presentation of a claim predicated upon the recently-decided *Hitchcock v. Dugger*). Although the State of Florida has opposed the requests of capital defendants to hold proceedings in abeyance in the past, your appellee submits that the circumstances of the instant case, namely, the rendition of the *Espinosa* decision subsequent to the entry of the District Court's Final Order, require abeyance of the proceedings in this Court until such time as the state courts are afforded the opportunity to pass upon a claim never presented therein. By this request, the State of Florida should not be seen as taking a position one way or the other that the *Espinosa* decision is a change in law for the purposes of Florida state law retroactivity. Indeed, even should a federal court believe that the *Espinosa* decision is a change in law, a proposition not

found by the Supreme Court of Florida, then the doctrine of *Teague v. Lane* would preclude the retroactive application of *Espinosa* upon federal review. Rather, this matter should be addressed initially by the state courts in the interest of comity. The instant case is obviously not at the stage in which an opinion or a motion for rehearing is pending, circumstances under which this Honorable Court may be justifiably reluctant to hold proceedings in abeyance. Rather, in an abundance of caution, this Court should require appellant to exhaust his state court remedies with respect to a claim arising under *Espinosa v. Florida*.

WHEREFORE, for the above and foregoing reasons, your appellee respectfully requests this Honorable Court to hold the instant proceedings in abeyance to permit appellant the opportunity to exhaust his state court remedies with respect to a claim predicated upon *Espinosa v. Florida*, and for this Court to toll the time for the filing of a brief on behalf of your appellee with respect to appellant's Issue VII.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARY MICHAEL LAMBRIX,

Appellant,

v.

CASE NO.
92-4539

HARRY K. SINGLETARY, Secretary,
Department of Corrections,

Appellee.

_____/

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO TOLL TIME FOR FILING BRIEF OF APPELLEE AND CONCOMITANT MOTION TO HOLD PROCEEDINGS IN ABEYANCE

Appellant, CARY MICHAEL LAMBRIX, by and through his undersigned counsel, hereby files his response to the State's Motion to Toll Time for Filing Brief of Appellee and Concomitant Motion to Hold Proceedings in Abeyance (hereafter referred to as the "State's Motion").

The State asserts that Mr. Lambrix failed to exhaust his claim that the instructions to his sentencing jury with respect to two aggravating factors failed to provide the jury with adequate guidance, thereby permitting the "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury," *Godfrey v. Georgia*, 446 U.S. 420, 430 (1980), and thus "invalidat[ing]" his death sentences. *Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 1139 (1992). This claim, which is raised as Issue VII in Appellant's Initial Brief, and which the State refers to as the *Espinosa* claim, has

been thoroughly and completely exhausted. The identical legal claim, regardless of what label was attached to it, was raised by Mr. Lambrix in state court and in the federal district court. At bottom, the State's position is that a citation to new case law requires return to state court for exhaustion. As shown below, the State's assertions are factually misleading and legally wrong.

The State asserts that only one paragraph of the original claim in state court related to the jury instructions. This is simply untrue. The claim was pled in state court as follows. Mr. Lambrix first asserted that he was entitled to relief under *Maynard v. Cartwright*, 486 U.S. 356 (1988), which is of course a case concerning the constitutionality of Oklahoma's jury instructions on its "especially heinous, atrocious or cruel" aggravating circumstance. He then recited that in *Proffitt v. Florida*, 428 U.S. 242 (1976), the Supreme Court had approved Florida's "especially heinous" aggravating circumstance, with the understanding that the limiting construction announced in *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), would be applied to the aggravating circumstance. He then made the following allegation, which the State completely failed to refer to in its motion:[1]

[1] The State asserted that it had conducted a "comprehensive examination" of the claim and found only one paragraph "tucked within the verbiage dealing with the purported vagueness of the jury *instruction*." State's Motion, at 2. If the State indeed conducted a "comprehensive examination" of the claim, it is surprising that it was unable to discover an entire paragraph dealing specifically with the vagueness of the jury instruction.

> The construction approved in *Proffitt* was not utilized at the *jury-sentencing* phase of Mr. Lambrix's case. The *jury was simply instructed* that one of the aggravating circumstances was the "capital felony was especially wicked, atrocious or cruel" (R. 1286).[2] The explanatory or limiting language approved by *Proffitt* does not appear anywhere in the record. *The court provided no further definition of this circumstance to guide the jury's deliberations.*

Emergency Motion to Vacate Judgment and Sentence, PC-R. 89-90 (emphasis supplied).[3]

Petitioner then quoted extensively from *Cartwright*. *Cartwright*, is of course, a case about the requirement that juries be properly instructed concerning aggravating circumstances. Thus, it is not surprising that the quoted portions of *Cartwright* refer repeatedly to the adequacy of the jury instructions and even state that claims regarding vague aggravating circumstances

> characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open.ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972).

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[2] The record citation is incorrect, presumably as a result of the time pressures of preparing the motion while Mr. Lambrix was under death warrant.

[3] As in his Initial Brief, petitioner will cite to the record of the state court postconviction proceedings as "PC-R."

Cartwright, 486 U.S. at ___, quoted at PC-R. 90. Petitioner then made the allegations quoted in the State's Motion at 2 n.1. As it must, the State implicitly acknowledges that these allegations assert a claim that the jury instructions failed to provide the guidance required by *Cartwright*, but backhandedly refers to the allegations as an "insertion." *Id.* But a fairminded examination of the actual claim, "comprehensive" or not, reveals that the very gravamen of the claim itself is that the jury's sentencing discretion was not properly guided. Of course, the claim also alleges that the Florida Supreme Court has interpreted the aggravating factor in an unconstitutionally overbroad manner, and that the factor would not be supported on the facts of this case if an appropriate limiting construction were applied. In that regard, the claim presented in state court was essentially identical to that considered by the Supreme Court in *Sochor v. Florida*, 504 U.S. ___, 112 S.Ct. 2114 (1992), which challenged both the constitutionality of the jury instructions and the Florida Supreme Court's failure to articulate and consistently apply an appropriate limiting construction.[4]

Thus, the State's contention that petitioner failed to fairly present a claim concerning the constitutionality of the jury instructions is simply wrong. Indeed, reference to the applicable case law, including that cited by the State, shows that it borders on the absurd. The leading case is *Picard v. Connor*, 404 U.S. 270 (1971). In *Picard*, the Court held that the habeas petitioner failed to exhaust an

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[4] In *Sochor*, of course, the Court declined to reach the merits of either contention. It then found Florida's jury instructions unconstitutional in *Espinosa, supra.*

equal protection claim, where his only challenges in the state courts were to the propriety of his indictment under Massachusetts law and an assertion that the Fifth Amendment's requirement of a grand jury indictment applied to the states. *Id.* at 276-77. The Court went on to note the limitations on its holding:

> [W]e do not imply that respondent could have raised the equal protection claim only by citing "book and verse on the federal constitution." *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958); *see Kirby v. Warden*, 296 F.2d 151 (4th Cir. 1961). We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts.

Id. at 278. Here, in contrast to *Picard*, petitioner cited "book and verse on the federal constitution." Petitioner set forth his jury instruction claim clearly, concisely and emphatically, and cited both the applicable constitutional provisions and case law dealing solely with an identical jury instruction claim. Far less than that is required to give the state courts a "fair opportunity to consider," *Picard*, 404 U.S. at 276, a petitioner's claims. *See, e.g., Cummings v. Dugger*, 862 F.2d 1504, 1507 (11th Cir.), *cert. denied*, 109 S.Ct. 3169 (1989) (claim of constitutionally inadequate voir dire fairly presented by citation to federal case regarding jurors' responses during voir dire); *see generally* 1 Liebman, *Federal Habeas Corpus Practice and Procedure*, 53-55 (1988 & 1991 supp.).

Not only was the jury instruction claim fairly presented in state court, it was set forth with even greater specificity in federal district court (contrary to the State's assertions), yet the State never argued that it had not

been fairly presented. Petitioner's original habeas petition, filed under death warrant, restated the claim as it had been pled in state court. R1-1-141-150. With the district court's permission, petitioner subsequently amended his petition. R2-51. Virtually the entire discussion of the claim in the amendment consists of an elaboration on the jury instruction aspect of the claim.[5] In response to this amendment, setting forth a jury instruction claim beyond any shadow of a doubt, the State argued that the claim was procedurally barred for other reasons, and that petitioner was not entitled to relief on the merits. R3-53-4-5. The State, obviously recognizing that a jury instruction claim had been presented in state court and in the original habeas petition, raised no argument to the contrary. Over a year and a half later, the State filed a Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, setting forth additional arguments for dismissal of the habeas petition, as amended. R4-89. The State again argued only that the jury instruction claim was procedurally barred on other grounds and the merits of the claim. *Id.* at 7, 13. Nor, of course, did the State argue that the claim had not been fairly presented either in its original response to the habeas petition, R1-13, nor in the supplement to its response. R2-16. Finally, it is clear that

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[5] For example, the amendment asserts that "the jury in his case was not adequately instructed" on the aggravating circumstance, R2-51-9; argues that the defect in the jury instruction could not be cured by any appellate narrowing construction, *id.* at 9-10; correctly quotes the jury instruction and argues that it was virtually identical to the one found unconstitutional in *Cartwright*, *id.*, at 10-11; and asserts that "the jury instruction was unconstitutional and this tainted the entire sentencing process." *Id.* at 11.

the district court recognized that it had been presented with a jury instruction claim, for it said as much in its Final Order:

> Petitioner asserts that the jury instructions regarding the "especially heinous, atrocious or cruel" and the "cold, calculated and premeditated" aggravating circumstances have been interpreted by the Florida Supreme Court in an unconstitutionally overbroad fashion in violation of the principles set forth in *Maynard v. Cartwright*, 486 U.S. 356 (1988).

R6-141-52. *See also id.* at 53-54, 55-56 (discussing the jury instructions and the jury's sentencing role in Florida).

Thus, whatever the State says now, it waived any exhaustion defense by failing to raise it in the district court. *See Granberry v. Greer*, 481 U.S. 129, 132 (1987) (appellate court has discretion whether to dismiss unexhausted claim where State waives the exhaustion defense; Court notes that it would be "unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for use on appeal if necessary."). Petitioner, however, does not rely on the State's waiver of the defense, because it is clear that the jury instruction claim was fairly presented in state court. Rather, the State's waiver in district court merely serves to make it clear that both the parties and the district court were well aware that the claim *had* been presented both in state court and the district court.

The only thing that has changed between the presentation of this claim in the state courts and the district court and its presentation before this Court is that in the

interim the United States Supreme Court decided *Espinosa v. Florida*, 505 U.S. ___, 120 L.Ed.2d 854 (1992). However, nothing in the exhaustion requirement prohibits petitioner from relying on intervening case law that supports an otherwise exhausted claim. *Garrett v. Morris*, 815 F.2d 509, 512 n.3 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987); *see also Vasquez v. Hillery*, 474 U.S. 254, 257-58 (1986) (petitioner may add new facts in support of previously exhausted claim).

Petitioner has fairly presented his jury instruction claim in the state courts and in the federal district court. That claim has merit both under *Espinosa*, and under numerous prior decisions of the Supreme Court. *See Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Shell v. Mississippi*, ___ U.S. ___, 111 S.Ct. 313 (1990); *Stringer v. Black*, ___ U.S. ___, 112 S.Ct. 1130 (1992). Petitioner is entitled to a determination of the merits of his claim now, in this forum, not after unnecessary delay caused by an unwarranted return to the state courts that have already had a fair opportunity to consider all of his claims.

WHEREFORE, for all of the above reasons, petitioner respectfully requests this Court to deny the State's motions to hold the proceedings in abeyance and toll the

time for the filing of the State's brief with respect to Issue VII.

/s/

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ATTORNEYS FOR APPELLANT

Cary Michael LAMBRIX, Petitioner,

v.

Harry K. SINGLETARY, etc., Respondent.

No. 81941.

Supreme Court of Florida.

June 16, 1994.

Rehearing Denied Sept. 8, 1994.

PER CURIAM.

Cary Michael Lambrix, a prisoner under sentence of death, petitions this Court for a writ of habeas corpus. We have jurisdiction pursuant to article V, section 3(b)(9), Florida Constitution, and find that Lambrix is not entitled to relief.

Lambrix was initially convicted of two counts of murder and sentenced to death in 1984. The convictions and sentences were affirmed by this Court in *Lambrix v. State*, 494 So.2d 1143 (Fla.1986). We have also rejected three collateral postconviction claims from Lambrix. *See Lambrix v. Dugger*, 529 So.2d 1110 (Fla.1988) (habeas petition); *Lambrix v. State*, 534 So.2d 1151 (Fla.1988) (appeal of trial court's denial of a 3.850 motion for postconviction relief); *Lambrix v. State*, 559 So.2d 1137 (Fla.1990) (appeal of trial court's denial of a petition for a writ of habeas corpus). Subsequent to these claims, the United States District Court denied *Lambrix*'s habeas petition, *Lambrix v. Dugger*, No. 88-12107-Civ-Zloch (S.D.Fla. May 12, 1992), but the Eleventh Circuit directed Lambrix to return to this Court to settle any unresolved issues stemming from the United States Supreme Court's decision in *Espinosa v. Florida*, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854

(1992). *Lambrix v. Dugger*, No. 92-4539 (11th Cir. Mar. 3, 1993). This proceeding is a result of that directive.

In *Espinosa*, the United States Supreme Court held that it was error to instruct a jury "that it was entitled to find as an aggravating factor that the murder of which it has found [a defendant] guilty was 'especially wicked, evil, atrocious or cruel' " because this instruction was unconstitutionally vague and because it failed to provide sufficient guidance to the sentencer for determining the existence of the aggravating factor. 112 S.Ct. at 2927-29. In addressing this type of *Espinosa* claim, we have recently held that a defendant must do two things in order to preserve the claim for postconviction review. First, the defendant must attack "the instruction itself, either by submitting a limiting instruction or making an objection to the instruction as worded." *Beltran-Lopez v. State*, 626 So.2d 163, 164 (Fla.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2122, 128 L.Ed.2d 678 (1994); *see also Atwater v. State*, 626 So.2d 1325 (Fla.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994). Second, the defendant must also pursue the objection on appeal. *Chandler v. Dugger*, 634 So.2d 1066 (Fla.1994); *James v. State*, 615 So.2d 668 (Fla.1993).

In the instant case, *Lambrix* properly raised and preserved his *Espinosa* objection at trial. The record reveals that, although *Lambrix* failed to object specifically to the vagueness of the instruction on the heinous, atrocious or cruel aggravating factor, he did request a limiting instruction based on the definition of the aggravator found in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). However, *Lambrix* did not raise the issue of the trial court's failure

to include this special instruction on his direct appeal and, consequently, *Lambrix's Espinosa* claim is procedurally barred. *Cf. Henderson v. Singletary*, 617 So.2d 313 (Fla.) (claim was procedurally barred because it was not raised on appeal even though the defendant had preserved the issue at trial by both objecting to the instruction and requesting an expanded instruction), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993).

Because appellate counsel failed to anticipate the United States Supreme Court decision in *Espinosa* and raise the *Espinosa* claim on direct appeal, *Lambrix* next argues that appellate counsel was ineffective. Although this present ineffective assistance of counsel claim is based on a different issue, *Lambrix* has already raised numerous claims alleging ineffective assistance of appellate counsel in a previous habeas petition. *See Lambrix v. Dugger*, 529 So.2d 1110 (Fla.1988). Because ineffective assistance of counsel claims have been considered and rejected in a previous petition, *Lambrix* is procedurally barred from raising such claims again in a subsequent habeas petition. *See Aldridge v. State*, 503 So.2d 1257 (Fla.1987) (defendant procedurally barred from raising an ineffective assistance of counsel claim when such a claim has been raised previously even though the current claim is based on a different issue). Furthermore, even if this issue was not procedurally barred, we find that appellate counsel was not ineffective under the test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because this Court would have

rejected *Lambrix's Espinosa* claim on direct appeal.[1] *See Henderson*, 617 So.2d at 317 ("[T]he failure to raise a claim that would have been rejected at the time of the appeal does not amount to deficient performance.").

We find that the remaining issues raised by *Lambrix* are also procedurally barred.[2] The petition for a writ of habeas corpus is denied.

It is so ordered.

GRIMES, C.J., OVERTON, SHAW and HARDING, JJ., and McDONALD, Senior Justice, concur.

KOGAN, J., concurs in result only.

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[1] The claim would have been rejected because the trial court used the standard jury instruction on the "heinous, atrocious or cruel" aggravating factor and because the United States Supreme Court had not yet rendered its *Espinosa* decision.

[2] Lambrix has also raised the following claims: (1) invalid aggravating circumstances were presented to Lambrix's jury including "cold, calculated and premeditated," "committed during a robbery," and "pecuniary gain," (2) Lambrix's death sentence is unconstitutional because this Court has failed to apply a consistent limiting construction of the "especially heinous" aggravating factor, (3) ineffective assistance of counsel, and (4) the State failed to prove premeditation beyond a reasonable doubt.

Cary Michael LAMBRIX,
Petitioner-Appellant,

v.

Harry K. SINGLETARY,
Respondent-Appellee.

No. 92-4539.

United States Court of Appeals,
Eleventh Circuit.

Jan. 3, 1996.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH, HATCHETT and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

I. BACKGROUND AND PROCEDURAL HISTORY

Cary Michael Lambrix was indicted on two counts of first-degree murder in connection with the 1983 killings of Clarence Moore and Aleisha Bryant.[1] At Lambrix's first trial, the jury was unable to reach a verdict and a mistrial was declared. At his second trial, the jury found Lambrix guilty and recommended the death penalty on both counts. The trial judge found 5 aggravating circumstances

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[1] A summary of facts surrounding the murders can be found in *Lambrix v. State*. 494 So.2d 1143, 1145 (Fla.1986).

in regard to the murder of Moore, 4 aggravating circumstances in regard to the murder of Bryant, and no mitigating circumstances with respect to either victim.[2] Thus, in accordance with the jury's recommendation, the trial judge imposed two sentences of death upon Lambrix.

The convictions and sentences were affirmed by the Florida Supreme Court. *Lambrix v. State*, 494 So.2d 1143 (Fla.1986). The Florida Supreme Court subsequently rejected challenges to Lambrix's conviction and sentence in three separate post-conviction proceedings. *See Lambrix v. Dugger*, 529 So.2d 1110 (Fla.1988) (denial of habeas petition alleging ineffective assistance); *Lambrix v. State*, 534 So.2d 1151 (Fla.1988) (appeal of trial court's denial of a 3.850 motion for post-conviction relief); *Lambrix v. State*, 559 So.2d 1137 (Fla.1990) (appeal of trial court's denial of petition for writ of habeas corpus). Lambrix then petitioned the district court for a writ of habeas corpus

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[2] The trial judge found the following aggravating circumstances with respect to Moore and Bryant: (1) the capital felonies were committed by a person under a sentence of imprisonment (Lambrix had committed the crimes while a fugitive from Lakeland Community Correctional Center where he was serving two years in the Florida State Prison System.); (2) the defendant was previously convicted of another capital felony (The judge found that, under *King v. State*, 390 So.2d 315, 320-21 (Fla.1980), *cert. denied*, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), Lambrix's conviction of Moore's murder was a previous conviction with respect to Bryant's murder and vice-versa.); (3) the capital felonies were especially heinous, atrocious and cruel; and (4) the capital felonies were homicides and were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The judge also found that the murder of Moore was committed for pecuniary gain.

pursuant to 28 U.S.C. § 2254. The district court denied the petition, *Lambrix v. Dugger*, No. 88-12107-Civ-Zloch (S.D.Fla. May 12, 1992), and Lambrix appeals.

While this appeal was pending, the United States Supreme Court handed down *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). The *Espinosa* decision had significant ramifications for Lambrix's claims that his sentencing jury was inadequately instructed on the "heinous, atrocious and cruel" ("HAC") and "cold, calculated and premeditated" ("CCP") aggravating factors. The state pointed out that the state courts had not had a fair opportunity to address the substance of Lambrix's claims as significantly transformed by *Espinosa*. Thus, on the state's motion, we stayed this appeal to permit Lambrix to present his *Espinosa* claims to the Florida state courts. *Lambrix v. Dugger*, No. 92-4539 (11th Cir. Mar. 3, 1993). On June, 16, 1994, the Florida Supreme Court denied relief on Lambrix's *Espinosa* claims. *Lambrix v. Singletary*, 641 So.2d 847 (Fla.1994). Lambrix's motion for rehearing was also denied. Because there is no longer reason to hold this proceeding in abeyance, we now address Lambrix's claims on appeal from the district court's denial of his habeas petition.

Lambrix raises a host of issues. We discuss Lambrix's *Espinosa* claims, and his claims that he was denied effective assistance of counsel at the penalty phase of his second trial and on appeal, that his second trial subjected him to double jeopardy, and that he was denied the right to testify on his own behalf. We affirm with respect to

these claims. The remaining claims are without merit and warrant no discussion.[3]

II. DISCUSSION

A. *Jury Instructions*

Lambrix asserts that the sentencing jury's consideration of the "especially heinous, atrocious or cruel" ("HAC") and "cold, calculated and premeditated" ("CCP") aggravating factors violated the Eighth Amendment because the jury was not given sufficient guidance concerning the application of these factors. *See Maynard v. Cartwright*, 486 U.S. 356, 359, 108 S.Ct. 1853, 1856, 100 L.Ed.2d 372 (1988), and *Godfrey v. Georgia*, 446 U.S. 420, 428-29, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980). We assume *arguendo* that the jury was not given sufficient guidance on these factors.[4] However, the trial judge

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[3] Lambrix also asserts on appeal: (1) ineffective assistance of counsel during the guilt phase; (2) the trial court erred in refusing to grant a change in venue; (3) the trial court's limitation of cross-examination of some witnesses denied Lambrix his right to confront witnesses against him; (4) the trial court erred in failing to give a jury instruction on voluntary intoxication; and (5) the sentencing court made miscellaneous erroneous rulings and instructions which deprived Lambrix of a fair and reliable sentencing proceeding.

[4] The jury was instructed that two of the aggravating circumstances which they could consider were whether the "crime for which the defendant is to be sentenced was especially wicked, atrocious, or cruel," and that the "crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." The only other instruction pertaining to either of these aggravating circumstances was

reweighed the aggravating and mitigating factors, and sentenced Lambrix to death. The state argues that the trial judge is presumed to know and apply the law in the narrow construction as required by Florida Supreme Court cases. Thus, the state argues that the sentencing judge's proper reweighing of the HAC and CCP factors cured any error in the jury's consideration of these factors. Under *Espinosa*, we now know that the sentencing judge's reweighing of aggravating factors is insufficient to cure constitutional defects in the sentencing jury's consideration of those factors. 505 U.S. at 1081-82, 112 S.Ct. at 2928-29. However, on facts identical in all relevant respects to this case, the en banc court in *Glock v. Singletary*,[5] held that *Espinosa*'s holding – i.e., a sentencing judge's proper reweighing does not cure the constitutional error – is a new rule which cannot be applied retroactively under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Thus, because Lambrix's conviction became final before the *Espinosa* decision announced the new rule, Lambrix's *Espinosa* claim is *Teague*-barred. *Teague*, 489 U.S. at 310, 109 S.Ct. at 1075.

B. *Ineffective assistance of counsel at sentencing*

Lambrix asserts that he received ineffective assistance during the sentencing phase of his trial because

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given subsequently when the trial judge stated to the jury: "If the evidence shows beyond a reasonable doubt that the death was caused by one or more numerous wounds to the decedent, you may be justified in finding that the killing was especially heinous, atrocious or cruel."

[5] 65 F.3d 878 (11th Cir.1995) (en banc).

counsel[6] failed to investigate and present mitigating evidence of Lambrix's alcoholism and drug dependence, and evidence that Lambrix had been subject to sexual and physical abuse as a child. Claims of ineffective assistance during the penalty phase of a capital case are subject to the two-prong analysis laid out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To make out a successful claim, Lambrix must show (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. 466 U.S. at 687, 104 S.Ct. at 2064. Because we find that counsel's performance was not deficient, we do not address whether the alleged errors in counsel's representation prejudiced Lambrix.

Counsel's performance is deficient if counsel fails to make a reasonable investigation for possible mitigating evidence in preparation for the penalty phase of a capital trial. *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987). This is not a case where counsel failed to make an investigation altogether, *Cf. Thompson*, 787 F.2d at 1451 (counsel failed to conduct *any* investigation of defendant's background for possible mitigating evidence), or where counsel made only a desultory or cursory effort to find mitigating evidence. *Cf. Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir.1987) (counsel's

[6] Although two attorneys collaborated on Lambrix's defense at trial, one was primarily responsible for the guilt phase and the other for the penalty phase. Thus "counsel" in this section of the opinion refers to the attorney who represented Lambrix during the penalty phase.

investigation consisted of consultation with probation officer and one interview with defendant and parents). Counsel undertook substantial effort to find mitigating evidence, enlisting the aid of an independent investigator, and interviewing Lambrix and at least five members of Lambrix's immediate family. Counsel consulted Dr. Whitman, a mental health professional who had conducted a psychological evaluation of Lambrix to determine Lambrix's competence to stand trial. Counsel also reviewed various prison records. At some point, counsel uncovered evidence of Lambrix's alcohol and drug dependence. However, Lambrix argues that counsel's investigation was inadequate because counsel failed to discover further evidence of chemical dependence, and counsel failed to uncover any evidence whatsoever of sexual and physical abuse and neglect. We turn first to Lambrix's claim that counsel was ineffective for failure to discover and present evidence of alcohol and drug use, and then address the similar claim with respect to physical and sexual abuse.

Lambrix argues that counsel's investigation was inadequate because counsel failed to uncover a wealth of additional available evidence of alcoholism and drug use. We disagree. After an evidentiary hearing, the district court found that counsel was aware of Lambrix's history of alcohol abuse; however, the district court also found counsel's failure to present evidence of chemical dependence at sentencing[7] was the result of counsel's tactical

[7] Counsel barely touched the subject of chemical dependency during sentencing. The only evidence of chemical dependence presented at the sentencing hearing was on cross-

decision to downplay the evidence of chemical dependency in order to focus on evidence of Lambrix's good character. As the district court noted, counsel could have reasonably determined that evidence of chemical dependence would be detrimental rather than beneficial in the sentencing phase, and that such evidence would undermine counsel's apparent strategy of painting the crime as a mere aberration in the life of a generally upstanding individual.

After a reasonable tactical decision has made further investigation into a particular matter unnecessary, an attorney is not deficient in his duty to make a "reasonable investigation" by failing to further investigate that matter. *See Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066 ("[C]ounsel has a duty to make reasonable investigations *or* make a reasonable decision that makes particular investigations unnecessary.") (emphasis added). Lambrix argues that counsel's failure to present more evidence of alcohol and drug dependency could not have been a tactical decision because counsel testified in a 1990 deposition that his tactic would have been to offer mitigating evidence of chemical dependency if such evidence had been available. However, our reading of the deposition transcript reveals that counsel at this point was not testifying from specific recollection of Lambrix's trial, but as to counsel's penalty phase strategy as a general matter. The deposition testimony does not expressly state why, in

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examination of state witness Polly Moore, the secretary of Lakeland Community Correctional Center. Counsel asked Moore if she was aware of records that indicated that Lambrix "drank steadily and had a dependence on alcohol."

Lambrix's particular case, counsel chose not to present chemical dependency evidence when counsel was aware that such evidence was available.

After a careful review of the record, we have no firm conviction that the district court erred in finding that counsel made a tactical decision not to present such evidence. *See Crawford v. Western Elec. Co., Inc.*, 745 F.2d 1373, 1377 (11th Cir.1984) (Under the clearly erroneous standard, a "district court's factual findings must be allowed to stand unless the reviewing court is left with a definite and firm impression that a mistake has been made."). The strong presumption that counsel's actions were the result of sound trial strategy, *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, the reasonableness of the strategy actually adopted by counsel as revealed in the record, and the weakness of the contrary evidence, all support the district court's finding that counsel made a tactical decision. Thus, we hold that counsel's reasonable investigation and his reasonable tactical decision to downplay chemical dependence made further investigation into evidence of drug and alcohol abuse unnecessary.

Lambrix also argues that counsel's investigation was inadequate because counsel failed to learn of Lambrix's childhood experiences of sexual abuse, physical abuse, and neglect. Lambrix proffers the affidavits of family members and friends, including some of the witnesses that counsel called during sentencing, who swear they would have been happy to testify as to Lambrix's abused

childhood if they had only been asked.[8] However, when counsel conducted the penalty phase investigation, there is no indication that Lambrix or Lambrix's relatives gave counsel reason to believe that such evidence might exist. *Cf. Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir.1995) (ineffective assistance where counsel had evidence that certain mitigating circumstances might exist but failed to investigate further); *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir.1988) (ineffective assistance where defendant informed counsel that mitigating evidence existed and counsel failed to investigate). Moreover, although there was ample extant documentary evidence of Lambrix's alcohol and drug problems, Lambrix does not point us to any documentary evidence of Lambrix's abuse or neglect

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[8] The district court refused to hear this, or any, evidence of sexual and physical abuse. As originally brought to the state courts, and before the district court below, Lambrix's claim that he received ineffective assistance during the penalty phase was based solely upon counsel's failure to uncover and present drug and alcohol dependency evidence. For the first time at the evidentiary hearing before the district court, Lambrix attempted to claim that counsel's performance was also deficient for failure to discover available evidence of sexual and physical abuse and neglect. Reasoning that this was an attempt to raise an entirely new factual theory which significantly altered Lambrix's ineffective assistance claim, the district court refused to hear the sexual and physical abuse evidence. *See Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir.1992) ("[A] habeas petitioner may not present instances of ineffective assistance of counsel in his federal petition that the state court has not evaluated previously."). Because we dispose of Lambrix's ineffective assistance claim on other grounds, we do not address Lambrix's claim that the district court erred in failing to permit a "full and fair" hearing on the sexual and physical abuse evidence.

that would have been readily available to counsel at the time. *Cf. Middleton*, 849 F.2d at 494 (counsel on notice of mitigating evidence when readily available records from various reform schools, family court, youth services, and prison health services chronicled defendant's childhood of brutal treatment, neglect, physical, sexual and drug abuse, low I.Q. and mental illness). In fact, in his interview with Dr. Whitman, Lambrix denied any physical or sexual abuse by his parents.[9]

Although counsel has the obligation to conduct a reasonable investigation even if the defendant is reluctant to cooperate, *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir.1991), *cert. denied*, 504 U.S. 943, 946, 112 S.Ct. 2282, 2290, 119 L.Ed.2d 207, 213 (1992), counsel cannot be held responsible for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence. *Funchess v. Wainwright*, 772 F.2d 683, 689 (11th Cir.1985) (counsel not ineffective for failure to discover defendant's history of psychological problems when defendant did not tell attorney of any past psychological problems), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1242, 89 L.Ed.2d 349 (1986); *Collins v. Francis*, 728 F.2d 1322, 1349 (11th Cir.) (counsel not ineffective for failing to investigate witnesses in mitigation when defendant failed to make their presence

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[9] There is no evidence that Lambrix ever denied the sexual abuse that he now alleges by a neighbor. However, during the sentencing hearing, Lambrix's brother portrayed the particular neighbor as a good influence in Lambrix's life, i.e., as an elderly person who Lambrix occasionally helped out with work around the house and yard. Thus, counsel had no indication that this particular neighbor might have abused Lambrix.

known to counsel), *cert. denied*, 469 U.S. 963, 105 S.Ct. 361, 83 L.Ed.2d 297 (1984).

As noted above, we conclude that counsel's investigation for the penalty phase was fairly extensive and certainly was not constitutionally deficient. Even after an extensive investigation, including interviews with witnesses who were in the household at the time of the alleged abuse and neglect, counsel had no indication that evidence of abuse existed. We therefore cannot hold counsel responsible for failure to uncover such evidence. Thus, Lambrix has not shown that counsel's performance was deficient during the penalty phase.

C. *Ineffective assistance of appellate counsel*

Lambrix argues his appellate counsel[10] was ineffective because counsel challenged only the guilt phase of Lambrix's second trial, and did not challenge the death sentences on appeal. Specifically, Lambrix asserts that counsel should have argued that three of the aggravating factors found by the trial court were not present: HAC, CCP and pecuniary gain.[11] We apply the same two-prong

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[10] Lambrix was represented by a different attorney on appeal than at trial.

[11] In his habeas petition to the district court, Lambrix also alleged that his appellate counsel's performance was deficient for the following reasons: (1) failure to challenge trial court's denial of change of venue; (2) failure to challenge Lambrix's absence during critical stages of the trial; (3) failure to challenge trial court's denial of a requested voluntary intoxication instruction; and (4) failure to challenge "under sentence of imprisonment" aggravating factor. Because Lambrix does not reassert these claims on appeal, they are deemed abandoned. *See Rogero v. Noone*, 704 F.2d 518, 520 n. 1 (11th Cir.1983).

test to Lambrix's challenge to the effectiveness of appellate counsel. *See Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir.1992) (applying *Strickland* test to challenge of counsel's effectiveness on appeal), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2624, 132 L.Ed.2d 865 (1995). Because counsel's representation was not deficient, we find that representation was not ineffective without addressing whether Lambrix was prejudiced.

Lambrix asserts that counsel's failure to raise sentencing issues on appeal was due to counsel's inexperience and ignorance. The record simply does not support Lambrix's claim. Although this was counsel's first death penalty appeal, the record shows that counsel diligently uncovered issues worthy of appeal and adequately presented those issues to the court. Counsel reviewed the record and trial transcript and consulted with Lambrix's trial attorneys to determine what issues might be raised. In addition, counsel consulted a Public Defender's Association manual on death penalty practice and obtained sample appellate briefs prepared for prior death penalty cases before the Florida Supreme Court. In all, counsel spent over 146 hours preparing for the appeal, including 75 hours researching and writing the appellate brief. Counsel specifically recalls reviewing the penalty phase portion of the transcript and discussing potential penalty phase issues with Lambrix's trial attorneys. Counsel asserts that he did not raise sentencing issues on appeal because there were simply no meritorious sentencing issues to be raised. Because the record

adequately supports all three of the aggravating factors that Lambrix now argues counsel should have challenged, we concur.[12] Thus, it is clear that counsel's failure to raise sentencing issues was not out of ignorance, but was the product of an informed belief that there were no meritorious sentencing issues. *See Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir.) (failure to brief issues reasonably considered to be without merit not ineffective assistance), *cert. denied*, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). Therefore, we find that Lambrix has failed to show that he received ineffective assistance from appellate counsel.

D. *Double Jeopardy*

The jury in Lambrix's first trial could not reach a verdict after nearly 10 hours of deliberation, and the trial judge declared a mistrial. Two months later, Lambrix was tried again and convicted on the same charges. Lambrix asserts that this second trial subjected him to double jeopardy because the declaration of a mistrial in his first trial was not a "manifest necessity." *See Abdi v. State of Georgia*, 744 F.2d 1500, 1502-03 (11th Cir.1984) ("The double jeopardy provision of the Constitution . . . requir[es] that a trial judge declare a mistrial without the consent of the defendant only after it (sic) determines that mistrial is a manifest necessity."), *cert. denied*, 471 U.S. 1006, 105 S.Ct. 1871, 85 L.Ed.2d 164 (1985). The genuine inability of

[12] Moreover, because *Espinosa* had yet to be decided, there was also no indication that a challenge to the constitutionality of the jury instructions on the HAC and CCP factors would be successful.

a jury to agree to a verdict provides "manifest necessity" for discharge and a mistrial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824); *United States v. Wright*, 622 F.2d 792, 794 (5th Cir.), *cert. denied*, 449 U.S. 961, 101 S.Ct. 376, 66 L.Ed.2d 229 (1980).[13] Moreover, we afford great deference to the trial judge's conclusion that the jury is genuinely deadlocked. *United States v. Nelson*, 599 F.2d 714, 718 (5th Cir.1979). Here, the jury returned to the courtroom several times during their long deliberation and indicated that they were having a difficult time reaching a verdict. At one point, juror 9 told the judge that "we are not going to agree, I don't think." On returning to the courtroom another time, juror 4 stated, "I think we are wasting our time," and juror 12 agreed. Still later, another juror commented that he "didn't think there was any use" to resuming deliberations. Finally, upon returning to the courtroom at 1:40 a.m., the foreperson announced that the jury could not reach a verdict. Under these circumstances, we find the trial judge's conclusion that the jury was genuinely deadlocked a fair and reasonable one.

However, Lambrix asserts that the judge coerced the jury into a deadlock by keeping the jury in deliberations until 1:40 a.m., refusing to feed the jury, and failing to provide for individual jurors' medical needs. While the

[13] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

double jeopardy clause sometimes bars retrial when mistrial is precipitated by the improper conduct of the prosecutor or the judge, *Wright*, 622 F.2d at 795, we find no evidence that the judge's conduct caused the mistrial of Lambrix's first trial. It is true that, after starting at 3:49 p.m. on December 8, 1983, the jury's deliberations did not end until 1:40 a.m. on December 9. It is also true that, at different points during deliberation, jurors informed the judge that they were hungry and that some of them needed medication. However, nothing in the portion of the trial transcript adduced by Lambrix supports his suggestion that the jurors' needs for food or medicine were not adequately satisfied.

The portion of the transcript proffered by Lambrix also does not support his argument that the trial judge "forced" the jury to stay in deliberations until early morning. The trial judge did tell the jury that he would have to sequester them if they were not going to be able to reach a verdict that evening, and that arrangements for sequestration would be difficult. However, the judge also made it clear that he was informing the jury of the possible sequestration for logistical purposes only, not to rush them in their deliberations. Although the judge then requested that the jury go back into the jury room and deliberate a little bit longer, it was the jury who ultimately requested to stay in the jury room that evening until they finally decided that they could not come to a decision.

We readily conclude that the weak and ambiguous citations to the record by Lambrix cannot overcome the presumption of regularity that attaches to state court proceedings. *Ford v. Strickland*, 696 F.2d 804, 810 (11th Cir.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). Therefore, Lambrix's assertion that the jury was coerced into deadlock by the trial judge is without merit.

E. *Right to Testify*

Finally, Lambrix argues that he was denied the fundamental right to testify on his own behalf because his counsel and the judge coerced him into choosing between his right to testify and his right to counsel. *United States v. Scott*, 909 F.2d 488, 493 (11th Cir.1990); *See also Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir.1992) ("It is beyond question that an attorney cannot threaten to withdraw during a trial in order to coerce the defendant to relinquish his fundamental right to testify."). The evidence which Lambrix presents on this issue relates only to events which occurred during his first trial. Even if we concluded that Lambrix was denied his right to testify during his first trial, the appropriate remedy would be to grant a new trial. *See, e.g., Scott*, 909 F.2d at 494. Therefore, because Lambrix has already received a second trial, this issue is moot.

Lambrix argues that we should hold that he was also denied the right to testify at his second trial. He asserts that he was still feeling coerced not to testify because the second trial commenced only two months after a mistrial was declared in the first, and he was being represented by the same attorney. However, there is simply no evidence in the record that Lambrix was coerced not to testify in his second trial. Two months is sufficient time for Lambrix and counsel to discuss a new trial strategy

which would permit Lambrix to testify on his own behalf, or for Lambrix to request other counsel who would allow him to exercise this right. Without evidence that Lambrix was subject to continued coercion, we cannot assume that Lambrix's apparent acquiescence to a trial strategy in which he did not testify was anything but voluntary.

Lambrix also argues that his counsel did not inform him that he had the right to testify at his second trial, and did not make him aware that the ultimate decision on whether to exercise that right belonged to him. Under *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir.1992), a defense attorney renders ineffective assistance if he fails to adequately inform his client of the right to testify, and that failure prejudices the defense. Lambrix's claim that he was unaware of his right to testify is dubious considering the evidence he has adduced concerning his attempt to assert that right in his first trial. Moreover, after receiving an evidentiary hearing on this issue before the district court, Lambrix adduced no evidence supporting his allegation that counsel failed to adequately inform him of the right to testify. Therefore, Lambrix has simply failed to show that some action or inaction by counsel deprived him of "the ability to choose whether or not to testify in his own behalf." *Id.*

III. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of Lambrix's 28 U.S.C. § 2254 habeas petition.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARY MICHAEL LAMBRIX,

Petitioner-Appellant,

v.

Case No. 92-4539

HARRY K. SINGLETARY,
Respondent-Appellee.

RESPONDENT-APPELLEE'S MOTION FOR CLARIFICATION AND/OR MODIFICATION OF OPINION

COMES NOW, HARRY K. SINGLETARY, Respondent-Appellee, and respectfully moves this Honorable Court for clarification of its opinion in the above-styled case, rendered January 3, 1996. Respondent-Appellee submits that clarification is necessary for the following reason:

In denying Petitioner-Appellant's claim for relief premised upon *Espinosa v. Florida*, 505 U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), this Court noted

> The state argues that the trial judge is presumed to know and apply the law in the narrow construction as required by Florida Supreme Court cases. Thus, the state argues that the sentencing judge's proper reweighing of the HAC and CCP factors cured any error in the jury's consideration of these factors.

Slip Op. at 5. The state believes that this Court has misconstrued its argument as to this point.

After rejecting the argument outlined above, this Court applied the holding of the en banc decision in *Glock*

v. Singletary, 65 F.3d 878 (11th Cir. Sept. 8, 1995), finding *Espinosa* to be a new rule which cannot be retroactively applied under *Teague v. Lane,* 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). Obviously, the state agrees wholeheartedly that the *Espinosa* issue is *Teague*-barred, and recognizes that it was entirely proper for this Court to deny relief on this basis. *Caspari v. Bohlen,* 510 U.S. ___, 114 S. Ct. ___, 127 L. Ed. 2d 236, 245 (1994). The instant motion is not suggesting that the Court should recede from its holding on this issue in any respect.

However, a review of the state's brief reflects that the state never in fact argued that any error in the jury's consideration of the heinous, atrocious or cruel and cold, calculated and premeditated aggravating factors was cured by the trial judge's proper reweighing of these factors, and it is respectfully submitted that clarification of the language in the opinion attributing this argument to the state is necessary. The state had asserted that Petitioner's *Espinosa* claim was barred since the Florida Supreme Court has determined the issue to have been procedurally defaulted in state court (Brief of Appellee, pp. 76 - 82). *Lambrix v. Singletary,* 641 So. 2d 847 (Fla. 1994). The state believes that the state procedural bar was a significant argument, particularly since this Court had remanded this case to the Florida Supreme Court during the pendency of this appeal so that the Florida Supreme Court could consider Petitioner's *Espinosa* claim, resulting in the express finding of a procedural bar noted above. In addition, the state's brief submitted that any possible error in this respect was clearly harmless since

the facts of this case indisputably demonstrated the applicability of both of the aggravating factors challenged in this issue (Brief of Appellee, pp. 83 - 84, 91).

The state is and has been well aware that "the sentencing judge's reweighing of aggravating factors is insufficient to cure constitutional defects in the sentencing jury's consideration of those factors" under *Espinosa,* and fears that the argument implying otherwise in this Court's opinion diminishes the credibility of the state's position in this matter. Therefore, the state respectfully submits that clarification of the state's argument is appropriate.

WHEREFORE, the state respectfully requests that this Court clarify its language and/or modify its opinion regarding the argument submitted by the state on this issue.

Respectfully submitted,

/s/ Carol M. Dittmar
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express/ Overnight Delivery to Robert C. Josefsberg, Podhurst Orseck Josefsberg Eaton Meadow Olin & Perwin, P.A., Fifty National Bank Building, Suite 1201, 25 West Flagler

Street, Miami, Florida 33130, and to Matthew Lawry, Volunteer Lawyers' Post-Conviction Defender Organization, P. O. Box 37039, Tallahassee, Florida, 32315, this 18th day of January, 1996.

/s/ Carol M. Dittmar
COUNSEL FOR
RESPONDENT

96-5658 LAMBRIX, CARY M. V. SINGLETARY, SEC., FL DOC

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 6, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before noon, Tuesday, December 31, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 10, 1997. Rule 29.2 does not apply.